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John Caldwell  
BY  
J. C. BROWDER

OF THE LOGAN COUNTY (KY.) BAR



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**TO**  
**THE COUNTRY LAWYER**  
**A SPECIALIST IN ALL BRANCHES OF A VAST**  
**AND ILLIMITABLE SCIENCE, THESE PAGES ARE**  
**AFFECTIONATELY INSCRIBED**



## PREFACE

To the Bench and Bar these desultory chapters are, with more or less trepidation, respectfully submitted. They were prepared at odd moments and under circumstances well calculated to hinder and impair consistent effort in such a line of endeavor. It will be accepted as axiomatic that the Law is a jealous mistress and will not brook a division of homage. Even as one cannot serve God and Mammon, you cannot serve the Law and — anything else. This is said, not by way of apology, but in explanation of the many imperfections and shortcomings which have found place in this volume.

As to the *venue*, no less than to the personal identity of those who appear in this chronicle, a prefatory word may not be out of place.

Mecklenberg County will not be found on the map of Kentucky; nor does its seat of government, the town of Greenwood, appear there. Nevertheless, the author gives assurance most respectfully that both Mecklenberg County and the town of Greenwood are very much in Kentucky, and have intertwined themselves into her history from the early infancy of the Commonwealth.

Touching the personal identity of those who grace the pages of this history, a more difficult and delicate task is presented. Realism and Fiction by joint and common effort have created them. That there may be no offense, in case any individ-

## PREFACE

ual should look into this mirror and recognize himself, it is here said that those things that compliment are but Realism, while all else is Fiction pure and simple.

J. C. B.

RUSSELLVILLE, Ky.,

June, 1912.

## CHAPTER I

THE June term of the Mecklenberg County Circuit Court convened on the first Monday in that month of months. As a rule the term did not extend over a period greater than three weeks, although under the law of the Commonwealth four weeks were allotted for that sitting of the court. At the time of this chronicle there was no extraordinary litigation on the docket calculated to extend the term beyond its usual period. Its duration, however, depended upon the dispatch of business and the many other innumerable contingencies so well understood by the profession and so thoroughly unappreciated and contemned by the laity.

On this first Monday in June, in a good year that shall be nameless, all was in readiness for the opening of court. Old Uncle Toby, the janitor of the somewhat ancient temple of justice, had, as was his unbroken custom thrice each year, swept out the building, sprinkled fresh water over the gummed plank floor, and added new sawdust to many small square wooden boxes, which useful and time-honored receptacles stood ready and willing to receive and absorb an unlimited quantity of amber fluid aimed at them with uncommon accuracy by lawyers, parties, officers, and spectators. Uncle Toby was a decrepit and bent old darkey belonging to that period in the nation's history styled by some philosophers as our elder and better day.

He had held his important position many, many years. He placed himself on somewhat of a lofty pedestal and, once having reached the topmost height, did not scruple to scorn the base level from which he had ascended. The other darkies in town regarded circuit court as a thing consisting of the judge, the Commonwealth's attorney, and Uncle Toby. It must be owned that Uncle Toby's bearing and his disdain of the members of his own race were responsible for this view among them. He had served many a day in his important post. The younger members of the bar could not recall the court-house at all without connecting Uncle Toby with it. Those at the bar who had reached middle age knew him at the time they were licensed, and the oldest practitioners said that he was there when they began their careers back in the obscure past.

This first Monday was a typical June day in Kentucky. The freshening breeze stirred softly through the great oaks and maples in the old court-house yard. The song of birds came from the thick foliage of the clustering trees, and the cooling shade afforded an inviting resting place.

These trees, aged sentinels of this house of law, by their very dignity commanded the visitor to pause and reflect. Throughout the fleeting years they had been dumb auditors to tragedy and comedy alike, and through their great, overhanging boughs had been wafted to high heaven the mighty, irresistible eloquence of forensic orator and advocate. In the iron days of *ante-bellum* tempests impassioned appeals, that made the old rafters shake,

had echoed through their soft and quiet leaves. Human life had been demanded of twelve men, sitting in a semi-circle, in thunder tones; gallows had yawned and murdered under their protecting shade. Yet, unmoved had they stood, oblivious to the shock of many a winter's blast and unresponsive to eloquence and oratory — in days when there was oratory, the kind that made men forsake home and perish, smilingly, in the din and roar of war.

People were coming into town, horse-back, mule-back, in wagons, buggies, and in other more or less motley-looking vehicles. The public water sprinkler had performed its morning service, and the main street, which ran through the center of the town, had a fresh and clean and cool appearance. The hitching rail, directly in front of the court-house, on the public square, an unmistakable monument of another age, was already being taken advantage of, and lazy mules and horses were idly lashing ambitious flies with their busy tails.

The presiding judge resided in another county in the district. He was not due to arrive in Greenwood until noon, the train on which he usually came being due at that hour. He reached there at twelve o'clock, had dinner with his friend and host, Jim Hanna, the dignified and altogether unique proprietor of the "best hotel in town," opened court at one o'clock, organized and charged the grand jury, called and set for trial the common law docket, heard a few preliminary motions and adjourned court until the following day, when the



usual grind began, commencing with, and completing, the criminal docket before going into the civil causes.

Judge Cole and Captain Henry, two leaders of the local bar, each with a practice more or less grand, peculiar, and unique, had been engaged in their usual occupation of pitching horseshoes in the court-house yard. It occurred to Judge Cole, after he had worsted his worthy opponent in several contests, that he had not yet prepared his "trial docket."

He therefore straightway repaired to the office of the circuit court clerk for the purpose of taking a memorandum of his cases. He was counsel in many causes, either expressly or by necessary implication. The Judge, on reaching the clerk's office, drew from his pocket a small memorandum book, such as enterprising commercial companies issue and send broadcast as advertisements, and at once began to jot down his cases, taking with great deliberation the exact style and number of each.

Now the Judge would never rise to his feet and make a motion in any cause unless he had his "private docket" in his hand. When at motion hour any member of the bar entered a motion of any kind, in any case in which the Judge chanced to be counsel, it was his invariable and unbroken habit to remark, adjusting his rather wise appearing glasses: "Pardon me, your Honor; allow me to examine my private docket — yes, yes, I object to that motion, may it please the Court." So many,

many times had the presiding judge heard this declaration coming from the profound Cole, that his sense of humor, of which he had more than a fair proportion, prompted him on several occasions to inquire of the attorney: "What is the ground of the objection?" Removing his glasses and looking intently out the window, with knitted brow Judge Cole uniformly replied, with something of a bow: "My grounds of objection, may it please the Court, are that the motion is not well taken." At which utterance the Court frequently was forced to seek refuge behind a certain vase with flowers that, thanks to the jailer's wife, was always on the bench.

Judge Cole, at the time of this narrative, was counsel for the sheriff of the county. The sheriff invariably sought Cole's legal opinion on such important matters as preparing his returns on summons and subpoenas and certain other complex and profound duties devolving upon the shoulders of that high functionary. Captain Henry had been the official attorney for the preceding sheriff, and that member of the Mecklenberg County bar could not at all appreciate the judgment and wisdom of the present sheriff in the matter of his choice of counsel. Captain Henry had in years ago been the sheriff of the county himself and, as he invariably "surmised," was not only learned in the law as a lawyer, but he had this learning supplemented by experience acquired in the actual administration of the shrievalty itself. Judge Cole, however, be it said to his credit, had been county judge

years ago and was likewise familiar with all "fiscal matters" connected with the office of sheriff.

The reader's pardon is asked for dwelling at such length upon Judge Cole and Captain Henry, for there were other members of the bar with whose personality this narrative shall treat and other persons outside the charmed circle with whom this tale shall deal. But the Judge and the Captain, being persons of no little importance, deserve a place in this history in consonance therewith.

There was Bill Scott, an attorney who insisted upon looking upon a certain well-known fluid when it was red, and who insisted on imbibing too freely when in the midst of his most "important cause." Years ago, Scott had thrown off the mask and now made no concealment of the fact that he believed in "going after business." When a suit was instituted, the luckless defendant in some way accidentally ran across Scott, who by the purest chance had had, not long previous, a case exactly resembling the one in question, and had actually gained it on a little point that he didn't "put everybody next to." And when an unhappy (or happy) individual was injured by some heartless and ruthless octopus, formerly known as corporation, Scott generally heard first the doctor's diagnosis of the injury. If inadvertently no physician had been considered needed by the injured man, very soon Scott had the fellow on his back and had a doctor at his "bed of pain and affliction." It was common talk, and of general acceptance, that Scott had put more men to bed by his wise and prudential coun-

sel than had any physician in active practice in the county. No counsel for the defense in any of Mr. Scott's cases had ever been able to say to a jury, "Why, gentlemen, if this man had been really injured, why did he not have a doctor and why did he not go to bed?" Once, years ago, it was reported, Scott got caught on that proposition — but only once, and no more.

Scott it was, who, at a previous term, had convulsed the court by a unique and altogether frank request. One fine morning, when motion hour was well under way, it was whispered about the courtroom that a wreck had occurred at the Illinois Central Railroad depot. Scott, restless and anxious to get to the scene, was unable to conceal his anxiety. Suddenly he arose and moved the court to suspend for an hour "to give every lawyer a fair chance."

Passing on to the other members of the bar, there was Colonel Stevens, a splendid type of the Kentucky lawyer. The Colonel had a large and compensating practice, and was counsel for one side or the other in every important case in the county. He numbered banks, coal mines, and railroads and many others of the *soulless* in his clientage. Lawyers, courts, and the public generally entertained a high regard for the Colonel both professionally and personally. He eschewed the criminal practice. It was not to his taste.

Tom Henderson, a younger man, of somewhere near two-and-thirty years, was foremost in that section of the State as a jury lawyer, and the older

members of the bar looked upon him as of great promise. Born and reared in Kentucky, he had inherited and absorbed a goodly quantity of native Kentucky eloquence and was an orator of great force and weight before any jury or audience. A good common school education, a few years at college, rounding out with two years in the law school, had prepared him for the profession. He was the senior member of the firm of Henderson & Brownlow. Brownlow, a quiet, modest, accurate student, was developing into what is known as a first-class office lawyer. He had persistently refused to make a jury speech and so long had he delayed breaking the ice that now what at the beginning would have been a trivial task, was an impossible thing for him to accomplish. As an investigator of authorities and as a pleader he was unexcelled at the bar. The firm of Henderson & Brownlow therefore made a successful and paying combination.

Marcellus Jumpus, another light, was more of an "advisory counsel" than anything else. He did not attempt to practice a case unassisted. If a mine explosion occurred, Marcellus was early on the scene, confidentially suggesting to bereaved widows and to injured employees that he had a "certain fine lawyer, a trial lawyer, in mind, who could take this case and make things hum," and that if he, Marcellus, were given the case he would not only throw his entire soul and head into the case, but he would obtain "able counsel to really take the lead in the court-house, while I do the quiet, valuable work on the outside." Jumpus had

profited by this method on several occasions. He found it a better business getter than practicing alone, and then, of prime importance, he avoided the deep waters at *nisi prius*.

Old Judge Thompson, formerly a member of the bar of Harris County, had practiced at the Mecklenberg County bar for twenty-odd years. He had a receding forehead, a rather small, drawn mouth, and a voice that always kept a high key. He was strong on the ethics of the profession; believed devoutly in the courtesies due from one lawyer to another; never missed a meeting of the Bar Association, uniformly making several speeches before that body on "the ethics of the profession." Believing that it was a courtesy due the court, he always made from three to ten motions at every sitting thereof. He could not be driven from a position unless perchance his opponent happened to be a visiting lawyer, in which event his desire to be courteous to the foreigner almost compelled him to confess the correctness of his adversary's theory. On several occasions he had been chosen special judge in some causes in which the regular judge was disqualified. At these times he assumed the bench with rare dignity and pomp, always wearing a long Prince Albert coat and white waistcoat, and brooking no delays or nonsense in his court, preserving a pose and decorum that would have put Lord Mansfield to shame.

In his practice he was noted for citing *absent* authorities. Invariably he referred to a case "directly in point," and that case was always some-

where in "14th Bush." Many times, when his citation had been challenged by doubting opposing counsel, Judge Thompson would hurry from the court-house post haste to his office, announcing that he would bring back "14th Bush" containing the case referred to. He never returned. The next morning he explained that he "had lost his memoranda."

Tobias Mathews, likewise a member of this bar, was possibly the youngest lawyer there at this time. He had had his license to misrepresent an unsuspecting clientage for about four years, having obtained a smattering of law at some modern make-shift law school, where one year of careless and untrained study prepared the ambitious for the fray. Mathews brought all sorts and conditions of lawsuits. He plunged in, heels over head, and rarely ever wakened until he had passed through the slaughter-house and fallen head first into the open grave — and then frequently he did not know what had happened. Mathews sued everything and everybody, and was the busiest and most active of all the lawyers at the bar. He talked incessantly, blinking the while small black eyes that shone from under a narrow brow; but about him was the saving grace of constant good humor, a trait in the profession that covers a multitude of sins. When he made an utterly hopeless motion or suggestion in court, and the bar could not restrain its laughter, nor the Court his amused smile, Mathews smiled with them and sat down, nothing daunted.

Ben Haggard, the Commonwealth's attorney, while he resided in another county in the district, was a constant and regular attendant upon the court, and therefore *ex-officio* a member of the Mecklenberg County bar. Haggard was a man of striking and handsome personality, an able advocate, a clean officer, and popular for his strong and vigorous enforcement of the law and his sense of justice manifest on all occasions. He usually came with the presiding judge at the opening of the term, completed the criminal docket, and returned to his home county.

Judge Thomas Lowden, the judge of the Seventh Judicial District, who presided over the destinies of the Mecklenberg Circuit Court, was an ideal trial judge. He was of average stature, clean shaven, attractive in personal appearance, and looked the jurist from head to foot. To Judge Lowden was given a finely developed sense of what lawyers call equity. In no case was he advocate, but in every case he was judge. He had a splendid education and a splendid legal mind; was thoroughly familiar with all rules of practice, and doubtless knew more of the science of the profession than any lawyer in the district. Notwithstanding his learning and profound ability as a judge, he was a sociable and most excellent companion, and was possessed of a rare and finely cultivated sense of humor. In a judge this is an oasis in the desert. It prevents him from developing into dry parchment and preserves his soul and heart.



The jailer was one Sam Henry, a cousin of Captain Henry. Sam had held the post for long years. No man in the county could beat him in the elections. He could kiss more babies and shake more hands than any four men in the county. In addition to this, there was added an unanswerable qualification for public office, to-wit, he was crippled.

Fent Bascom, the sheriff of the county, was a long, blank-looking individual, who won his office on the ground of his "fine nerve." It was said of Fent that he would fight a tree full of wildcats with his right hand tied behind him. In a republic or democracy the electorate cannot resist that. It was so in Greece, even as it is now.

Tom New was the circuit court clerk. Tom was a wonder. He was perhaps fifty years of age, short of stature, clean shaven, and wore glasses — and invariably looked over them. His legs bowed in, so that he must have been knock-kneed. He smoked a pipe constantly. He gave gratuitous advice to every litigant in his court, and had he been as wise in reality as he incessantly posed, Solomon would have been as naught in comparison. When he read his orders at the morning session he would look over his silver-rimmed spectacles in the direction of the Court, as if to say, "Haven't you got a great clerk?" When he made what provincial counsel call a "break," that is, some inexcusable mistake, he was not daunted. The laughter of the attorneys, Court, and spectators had no terrors for him. He promptly, with flexible veracity, in-

vented some excuse, usually attaching all the blame to some lawyer or officer who, be it said, was always absent. These excuses were transparent inventions, pierced by everybody, but New thought all hands accepted them, and was content. Such was his lack of penetration, so little of it was vouchsafed to him, that he imagined his observers had none. He blundered and blustered, and doing so was self-persuaded that he was the best of clerks. When unexpectedly called upon to administer an oath to witness or jury he invariably knocked over a chair, two or three order books, and concluded the performance by using the wrong oath. He would swear the witness *to try the issue* and the jury *to tell the truth*. He was on both sides of every case tried in his court. The plaintiff appreciated New's hope of his success. The defendant had the same gratitude. When occasionally he was confronted by them both, instead of being taken back he only laughed and said he really hoped for each good friend's success. On public days he would invite twenty voters home to dine with him, proceed homeward alone, via an unusual route, and later would upbraid his disappointed guests, swearing they must have concealed themselves, as he looked for them all over town.

He was chosen clerk for the simple reason, really, that he ran for the office year in and year out until the electorate, exhausted and wearied at his persistency, elected him for the purpose of getting rid of him. Such was New, with his legs curved the wrong way. When you looked at him you had

a feeling of regret and sadness. Sadness because Charles Dickens never knew him.

There were other lawyers and other persons at this term of court, but enough has been said concerning the chief characters with whom this history shall deal. The others will be introduced to the gentle reader as we progress. The *dramatis personæ* in chief have been presented.

The stage is set, the actors costumed and ready. At a tinkle of the bell the curtain shall rise. It is to be hoped that pit and dome can see and hear. The thing is presented to you, O critical reader, just as it transpired. Whether the lawyer was profoundly learned or profoundly ignorant, your own learning must decide. The chronicle will not so specify.

## CHAPTER II

It was just twelve o'clock when Judge Lowden alighted from the 'bus or carry-all in front of the Hanna House. Several visiting lawyers, members of the grand jury for that term, and a handful of traveling salesmen likewise tumbled out of the ancient vehicle and made for the hotel register. The hotel proprietor, Mr. James Hanna, addressed by everybody simply as "Jim," and referred to by everybody as "Old Jim," was at the door of his well-known hostelry, wearing his usual smile, which peeped from under a rather bristly, sandy mustache.

"Hello, Judge! How's the Court this time?" At the same time extending his long arm, shaking Judge Lowden warmly by the hand.

"Middlin', Jim, thank you. How's the wife and youngsters?"

"Well and hungry as usual. Judge, twenty-eight will be vacant by supper. There's a traveling man in there now, but he gets out this evening. You can just leave your suit-case in Sarah's room this evening."

Here a white-eyed, pearly-toothed darkey appeared at the rear door of the office and proceeded loudly to ring a large bell, announcing the noon-day meal.

"Gentlemen, the feast is spread in the banquet

hall. Those who hunger and thirst may proceed to that room."

This was Old Jim's regular remark each day at dinner. He had a solitary waiter — a black, real black, darkey who went by the name of Fox. Fox had no mind at all. He did not need it in his vocation. His intellectual machinery operated on a limited scale only and consisted in "How will you have your eggs? Coffee, milk, or water?" That was the extent of his conversational powers. When a smart traveling salesman curtly replied, "Straight up, and coffee," Fox invariably brought them boiled, with a glass of milk. But, with all these shortcomings, Fox was possessed of one divine gift, a gift not dissimilar to one possessed by Judge Cole in his arguments to juries — *staying qualities*. That blessed accomplishment covered more than a multitude of sins surely with Fox, possibly with Judge Cole.

In passing from the hotel office to the dining-room, one had to enter through a narrow hallway or passageway, where was found a wash basin, a bucket of water, and a towel which hung from a rack on the wall. This towel was of doubtful age and unquestionably was a veteran in the business. A small vacant room opened into this little passageway.

As Judge Lowden passed on his way to the dining-room Old Jim, with a twinkle in his eye, which had a well-fixed significance to the Court, looked out from the vacant room and beckoned to the Judge, with the remark that he had a little "fluid,"

and inquired if the Court would care to have a "nip" before dining. The Judge replied, with thanks, in the negative. If one could have witnessed what followed he would have observed Old Jim happily drawing a cork and muttering to himself the words: "I can't figure out how the Court can decline a drink."

Now, be it said here at this stage that Old Jim was beyond the meridian of life, and his friends and enemies agreed that in his day he had consumed enough "licker" to float a battle-ship. He was of the iron type, and had a constitution like an ox. When he had "too much aboard" he had the good sense to disappear until fully recuperated. When he had the due and proper quantity, which philosophers have never yet been able exactly to measure, he was a genius of rare type, overflowing with anecdotes, told with wonderful charm and accomplishment. Sometimes he swore right nobly, and though he admitted to the charge of having his religion in his wife's name, yet he was in common parlance "as straight as a string" and was never known to have done a questionable act or injured friend or foe.

Judge Lowden having completed his repast, now sought his usual seat under a bending water maple that overhung the pavement in front of the hotel and, lighting a cigar, was engaged in passing away the few remaining moments before the time for the opening of court. Hanna, drawing a chair near the Judge, began, as was his wont, to recite different bits of news and events since the last

term, directly leading up to a present smallpox alarm, which had threatened to require the postponement of the entire term of court. The Judge, some week or ten days previous to the convening of the term, had been informed fully as to the conditions, and after careful inquiry and mature deliberation had concluded that the scare was much exaggerated, and had determined to hold the term as usual. He reached the conclusion that the County Board of Health was unduly exercised, and that it had overestimated and magnified the whole situation, due, possibly to an exaggerated idea of its own importance. In fine and in short, nobody save the members of that wise body had taken the matter seriously, an attitude the health board could not at all appreciate or comprehend.

This smallpox scare was the topic uppermost in Jim's mind, for the very excellent and all-sufficient reason that had the opinions of the board been taken seriously, their counsel heeded, and proper quarantine regulations established, travel in and out of Greenwood would have been light and the earnings of Old Jim's hotel would have been correspondingly reduced. This potent fact, coupled with Jim's ancient and natural political differences with the chief members of the board, made it an agreeable and easy task for him to join in the general ridicule and to enjoy the discomfiture of the earnest advocates of universal vaccination and strict quarantine. Thus he opened the subject:

"Judge, we have been havin' hell with the Board of Health since you were here last February. Old

Doctor Bowmer has been tearing his shirt. He says the people don't treat the board with due respect. You know the old Doc,— well, he's dignity itself, and he can't figure it out why the people don't obey his sweeping order about vaccination. It's a great story. But there's the court-house bell and I'll have to tell you about it later."

Responsive to the ringing bell, Judge Lowden arose and made his way to the court-house. The members of the bar were seated about in a semi-circle, Judge Cole, glasses adjusted, scanning his "private docket"; Captain Henry, freshly shaven, with papers protruding from every visible pocket; Bill Scott, looking as if he had not had a drink for thirty days, abusing the clerk for losing a record in an "important case" in which he was counsel. Colonel Stevens was not present; but with that one exception the entire membership of the bar occupied their places when the Judge entered.

"Mr. Clerk, call the grand jury," came from the bench, and the June term of the Mecklenberg Circuit Court was under way.

On the *voir dire* the usual routine of questions and answers were put, the Court assuming the monotonous task of qualifying the members of the grand jury. The archaic and now ridiculous questions relating to keepers of taverns, the one relating to "horse, jack, or bull" were put and answered. In replying to the interrogatory as to whether any member of the panel was a civil officer, one dignified, magnificent-looking old farmer, one of the most prominent men in the county, said



slowly, "Jedge, I'm gardeen for a minor heir." He was chosen and was the balance wheel of the jury — such was his native sense. Monarchies, despotisms, plutocracies, take note of this and trust your plain citizenry.

Accepting some excuses, denying others, ordering the summoning of several by-standers to complete the panel, the twelve "inquisitive gentlemen" were soon in the jury box and were listening, with more or less interest and appreciation, to a clear and excellent charge, in which their duties were defined and in which suggestions of the method of their work were made. Many penal statutes were directly pointed out to them; others referred to generally. They were told impressively to know no friends and remember no enemies; that the salvation and endurance of the Commonwealth depended upon their duty being done fearlessly and impartially; that prosecutions must originate with their action and that theirs was a grave and serious responsibility.

Near the conclusion of the charge it was observed that Doctor Bowmer was gradually nearing the bench. He was advancing by small creeps. He had written to the Judge before his coming to Greenwood, telling him of the flagrant violation of the laws relating to vaccination, naming many specific cases, with the request that the grand jury be charged especially as to these gross infractions of the law. He had sat there and heard the Court's charge, and thus far no mention had been made of this most serious subject. He was visibly annoyed.

As the Judge grew nearer and nearer to the end of his admonition, Dr. Bowmer's anxiety increased. He grew nearer and nearer to the Judge. He was now quietly and noiselessly approaching the Bench. When the Judge reached a pause in his lecture, Dr. Bowmer arose and whispered to him, "Tell 'em about the Board of Health." The Judge, very quietly and with something of a chill in his voice, said to the anxious doctor: "Doctor, take a seat outside the bar rail," and without any mention of the Board of Health or smallpox or vaccination shortly brought his charge to an end with "I will appoint Mr. Hardy foreman of this grand jury. Mr. Sheriff, conduct them to their jury room." Whereupon the twelve members of the inquisitorial body slowly filed out of the court-room, not before, however, Mr. Hardy approached the court with the excuse that an older or more experienced man should be foreman, to which the judge only smiled and said very kindly: "We will afford you an opportunity to acquire some experience."

The common law docket was then passed to the Judge and he began the calling of cases, suggesting to counsel present that they indicate what cases would likely be tried and those that would not be tried, so that he could set the docket for jury trials. As was usual on the first day, every case was considered as certain to be tried. The first case called brought Judge Cole to his feet, moving the Court that it be dismissed without prejudice. Now Captain Henry was opposing counsel, and he objected, for the defendant, to the case being dis-

missed. A strange smile lighted up the face of the Judge. He queried Captain Henry and asked him how or by what rule of practice he could prevent a plaintiff from dismissing his own suit, to which the Captain replied:

"If the Court please, this suit has been on this docket for a year. We are ready for trial. They are running. We've driven them to cover. Now, after the pleadings are all made up and the case prepared for trial, it's a great injustice to the defendant to simply throw the case out of court. Under the constitution we are entitled to a trial, and we now demand a trial. Ordinarily, I believe in extending all courtesy to opposing counsel, but in this case, sir, we will neither give nor ask quarter. We want it practiced strictly by the Code and under the constitution."

There being no jury business for that afternoon, the Judge, who sustained himself by the humor of the practice, treated these suggestions as serious, and called upon Judge Cole to know what his views were on the subject. Cole, quickly seeing the general smile that pervaded the bar when Captain Henry made his point, knew that the Captain had made a fool of himself, but really did not know in just what particular. He knew enough, however, to warrant him in ridiculing his worthy opponent, trusting to the accuracy of the general smile that went the rounds when the Captain resumed his seat. Let it be here said that Judge Cole was an adept in the art of catching on in an instant. He arose with a smile of scorn on his lips, adjusted his

glasses, looked over his "private docket" and, addressing the Bench, said:

"May it please the Court, for many years I have practiced at this bar. I never heard of such a suggestion before the beginning of the trial. No jury has been chosen; no witness has appeared, and now, to-day, the first day of the term, I come and move to dismiss this case without prejudice. I have that right at this time. I will admit that had I waited until to-morrow or the next day or until the case had been set down for trial there would be a grave question presented whether we had this right—a very serious question would then arise; but at this stage Captain Henry's point is amusing."

The Judge looked at Captain Henry, who was turning very rapidly the leaves of the Code. The Captain, taking the look to be an invitation to proceed with the discussion, arose and with a freezing accent in his voice and more or less of contempt in his expression, said:

"I desire to remind Judge Cole of the fact that this is not a magistrate's court that we are in. I concede that before a justice of the peace the gentleman's point might receive serious consideration. I have here the Constitution of the State, the Code of Practice, and the Kentucky Statutes. I have examined all of them"—his voice here beginning to rise, indicating that a speech was coming—"and, sir, I am here to say that we are entitled to a trial of this cause. Will Mr. Cole—I cannot say Judge Cole now—will Mr. Cole take issue with the Constitution? It guarantees to every man charged

with crime a speedy trial. Not a dismissal, which is nothing, but a trial, a speedy trial. The Bill of Human Rights at the very start of the Constitution says so; all the books say so. Will counsel — no, pardon me, will the gentleman deny that authority? I make the point ——”

He was here interrupted by Judge Cole, who arose and said: “If the Court please, I have this case down on my private docket. It is the case of *Sylvester Dupoyster v. Finis Blacklock*, and is number 2645, Common Law. Nobody is charged with crime in this case. This is a civil suit for money we claim to be due us. Counsel talks as if it were an indictment and I was the Commonwealth’s Attorney. I concede that if this were an indictment and I were the State’s Attorney, Captain Henry’s remarks would be well founded, for the Constitution and Code and Statutes all give to a man charged with crime the right to a speedy trial. In such a case the point of Captain Henry would, of course, prevail, but,” turning fiercely to Captain Henry, “sir, show me any constitution or code or statutes or decision anywhere demanding any speedy trial in a civil case. On the contrary, such cases are always delayed. Why, sir, I know of cases on this docket that have been there for years and years, and no complaint has ever been made. I guess I’ve got the inherent right to dismiss my own case, and I insist on my motion to dismiss. Your Honor can’t have any doubt about that proposition. If so, I’m willing to leave it to the crowd here. Every lawyer knows that.”

At this juncture Captain Henry looked the part of a defeated general. He was knitting his brows and appeared as wise as possible, but he knew not what to suggest. One of the younger members of the bar was seen to pass the Captain a note, which he hurriedly and slyly read, doing his utmost to conceal the fact from onlookers. As he read, the anxious expression gradually faded from his face; a smile lit up his countenance and he looked the very monarch of all he surveyed. He arose, smiled with infinite pity upon his antagonist, and in a spirit of crushing triumph said to the Court:

"It seems not to have dawned upon the Judge — pardon me, I should say Mr. Cole — that I have a counterclaim in my answer in this case. The plaintiff cannot have the whole case dismissed when his adversary has a counterclaim against him. Did I not, Mr. Cole, just a few moments ago remind you of the very manifest fact that this is not the court of a justice of the peace, but the forum of the circuit court? If not, permit me to now call your attention to that fact. Do you follow me?"

Edmund Burke himself could not have shown the withering satire and sarcasm that Captain Henry manifested after the receipt of the life-saving communication from the friendly young lawyer, that saved the day for him. Judge Cole, evidently in despair, was on the verge of surrendering at once, as he did not know how to meet this last sudden and apparently unanswerable thrust. The Court, looking in Judge Cole's direction, discov-

ered him sitting very low in his chair, apparently without any reply ready for Captain Henry. He was slowly turning the leaves of his "private docket," visibly affected by Henry's last blow, but trying to conceal his anxiety.

"Well, Judge," said the Court, "what have you to say to that last proposition of the Captain's?"

"There's nothing in the point, if your Honor please. I don't care to draw out the discussion longer. I say there is nothing in the point. I simply desire that my motion be submitted."

"But," said the Court, "what do you think of the point as to the counterclaim? I want to hear your views on that question."

"May it please this honorable court——" At this juncture Judge Cole felt some one pulling at his coat-tail, and, looking around, observed a young lawyer, a visiting attorney from Madisonville, trying to clandestinely hand him a note. He seized the communication with the frenzy of a dying man and placed it between the leaves of his "private docket" and did it so quickly that only the sharp eyes of the Court and a few of the spectators observed it. He continued:

"Pardon me, Judge, permit me to examine my private docket."

He looked long and closely at his "private docket" and then resuming said, with even more satire and scorn than Captain Henry had employed:

"The counterclaim mentioned is not in fact any counterclaim at all. My suit is a suit on an open account, consisting of various items, making a to-

tal amount due on the account of \$193.50. The defendant files a thing here which he marks answer and counterclaim, and asks judgment over and against my client for \$5.50 alleged damages for alleged slander. Now, I submit that the damages are not in liquidation, do not grow or flow out of the matter sued on, and are not a part of the transaction involved in the original lawsuit. And,"—turning to Captain Henry—"speaking of magistrate's courts, it seems you have been hoisted up again on your own spike. The idea of pleading slander damages in counterclaim in a suit on an open account! Preposterous!"

Here Judge Cole resumed his seat in triumph. Captain Henry was on his feet in an instant.

"Judge, the Code says that if the thing grew out of the thing in controversy it can be pleaded in a counterclaim. Now all of this slander sprang directly—not indirectly, but directly—from this account. I will overwhelm them with proof as to what the plaintiff, Dupoyster, said about my client, and I ——"

Here the Court interrupted with:

"Captain Henry, please read me that part of your answer relating to the counterclaim."

"All right, your Honor," replied the Captain, "I was just going to suggest that very course. I will proceed."

The following part of the answer and counterclaim was then read to the Court by the expert pleader:



“Reiterating and renewing all his former charges and claims and allegations, defendant now comes and says that he not only does not owe the account sued on, but that the plaintiff knows, and knew at the time of the things hereinafter set out, that he owed no part of said account. He alleges that the plaintiff sent him many letters and duns to pay said alleged account; that he sent said letters through the mails of the United States, and sent postal cards, dunning him and annoying him and harassing him, not concealing the purpose of said notes and postal cards, but writing them thus openly so that people could see and understand what the said duns and demands were about; that in this wise defendant was greatly humiliated and disturbed and annoyed and harassed; that the plaintiff talked about this defendant in an unbecoming and slanderous manner, telling everybody who came into his store that the defendant would never pay an honest debt; that he was a dead-beat, a bum, and such other rude and highly uncomplimentary things; that he said to Sam Jenkins on the—— day of———these words or in substance these words: ‘He’ (referring to defendant) ‘aint worth three hurrahs in hell’ (referring to defendant’s financial standing and not his particular personality) ‘and if the store business in this country depended on such cattle as Finis Blacklock, the dealers might as well shut up shop right now.’ Defendant says that by virtue of said wrongful and viperous charges and slanders he, the defendant, who theretofore stood high in the neighborhood,

was reduced to a bad standing and reputation; that all of his friends and neighbors believed said charges and claims, though they all knew the defendant's previous good reputation and really knew that the plaintiff was a reckless man with the truth, liable to say anything if a dollar was at stake. He says his credit was shocked and broken and impaired, on account of said vile slanders and false claims and charges as aforesaid; that previous to the utterance of said charges defendant was able to get credit anywhere to a reasonable extent, but that since he has refused to pay this debt to the plaintiff he is unable to obtain any credit anywhere. though the other store keepers and merchants all know that the claims and charges of the plaintiff are all false, on account of the previous good reputation and high standing of this defendant; but they, said other merchants out of care and prudence do not of course like to run any extra risks, all of which has been the direct and approximate result of plaintiff's conduct, which has been continuous, without any intervening agency; that said damages resulting, as aforesaid, are not remote or contingent, but are plain and ambiguous; that no part of said damages has ever been paid, though overdue and many times demanded; that the defendant has no inadequate remedy at law or in equity, save by means of this proceeding, and, as defendant verily believes, he will receive great and irreparable injury unless the court grants him redress here and now in this action; that no court or clerk or judge or sheriff or jailer or constable

has ever denied him this relief, and that same has never been applied for and refused heretofore. He says if required to maintain a separate action for damages, he will be endangered by delay in procuring a judgment, having an execution issued and returned 'no property found,' because the plaintiff has threatened to transfer his property, said store, to his wife (which, however, would be a fraudulent conveyance, but we could not attack it until six months passed, which would be too late); that there are no other liens on said property, so far as the defendant has heard or knows save this one; and that the plaintiff's property cannot be divided without material injury to this defendant. Said account is for \$193.50 that plaintiff claims the defendant owes him, and defendant says that for said viperous slander and abuse, his claim against the plaintiff is for \$199.00, so that, premises considered, even if the court or jury (but this is not a jury case, however) should hold that defendant is bound for said account of \$193.50, then plaintiff is bound for this slander bill of \$199.00, so that the plaintiff will owe defendant, on a settlement, the sum of \$5.50 and all his costs, including a reasonable attorney's fee to Thomas Henry, Esq., his attorney and counselor at law (who prepared this case for him at some pains). And in view of all the premises and the cross accounts between the parties litigant in this action, defendant asks that this cause be referred to the Master Commissioner, who shall be charged and directed by the court to audit and

marshal both of said claims and present them, properly proved, to the court for final determination and adjudication; and this answer setting up accounts and questions too complicated for a jury to try with sense and accuracy, the defendant moves that this case be taken from the jury docket and be known as an equity case, to be decided by the court, on this answer and the report of said Master Commissioner (after he makes said report).

"And now having fully pleaded the things and matters above enumerated, he prays as herein indicated and he also prays for such other general and proper relief as he may appear entitled to (including costs and the fee for his attorney, Thomas Henry, Esq., his counsel herein, who prepared this case at some pains) and further deponent sayeth not.

FINIS BLACKLOCK,

"By Thos. Henry, Atty."

"Now, your Honor," continued the Captain, "you have the whole thing laid bare. You see the wrong and the damages and the disgrace and reduction of earning power, shaken credit, lost standing, and all these infinite things that go to destroy a man's previous good standing. We say it grows out of this account, and we demand redress. All we want is a chance at 'em. Will jurisprudence deny us that? Must justice hang her head in helpless oblivion and melancholy? Is this temple of justice a mockery? I know this Court well enough to know his answer."

The Captain dropped in his seat with victory in his eyes and scorn upon his lips. But Judge Cole had been told by one he knew to be a most excellent lawyer, in that life-saving note, that the matter set out in that answer could not be pleaded in a counterclaim, and he was sure of his ground. He arose again:

"Judge," he said, "I dislike to prolong a foolish argument, but we lawyers never know what the Court might do unless we give the Court full and free benefit of our views. Out of precaution. I shall reply to the argument of my friend on the other side of this case — this important case. I shall begin by saying ——"

Here the Court interrupted, saying:

"Judge, I do not think it necessary to further press your point. I do not see how that matter can well be matter for a counterclaim. I am clear that it does not come up to the requirements of the Code. It is foreign to, instead of growing out of, the transaction set up in the petition. Unless Captain Henry can show me some authority or suggest some more plausible reason, I will have to sustain you on that proposition."

Captain Henry was again in the depths. He said afterwards that he felt himself slipping. At this particular and perilous moment, however, he again felt a friendly nudge at his side, and at once, as if from an inspiration, held his hand behind his back, hoping to conceal his movements from the Court. Someone quietly and deftly slipped another note into the palm of his hand, which, placing

between the leaves of the open Code, he quickly read. A smile stole gradually over his face; there was cheer in his soul. Quickly and secretly crumbling the note between his fingers, he arose and with the utmost confidence proceeded to furnish the Court the "more plausible reason" called for by his Honor, speaking thus:

"I have thought about what your Honor has said. I went deeply into that feature of the case when I prepared that pleading. But, may it please the Court, there is no demurrer to this counterclaim; there is no motion to strike,"—his voice rapidly rising—"there is no motion to elect. Sir, there is a reply; a reply on the merits; a pleading on the merits, denying all of the allegations of my counterclaim. They have waived the thing; they have waived everything; they have voluntarily submitted to the Court's jurisdiction, and now, after waiver, after an express and deliberate waiver, can they crawfish and back out and hedge? I submit that if they had raised the question at the proper time they might have been right; but at this stage, never! They reply, they plead; their reply contains all sorts of things, does it not, *Mister Cole*? Permit me to ask you, is it just a denial or does it contain any affirmative matter?"

By Judge Cole: "It's a mere *travesty*, a complete *travesty*; no affirmative matter whatever."

The Court was again seeking refuge behind the flowers.

"I thought it had," continued Captain Henry, "a second paragraph of new matter. But that

cuts no figure. You answered on the merits; you replied; you forever waived your right to now raise this question. The Court knows that the law frowns on such dilatory tactics."

"May it please the Court," renewed Judge Cole, "I did not file a demurrer because I thought this the best way to raise the question. I thought about the demurrer and the motion to strike and the motion to elect. Mr. Henry don't catch me on any of those elementary things, but I was due to plead in March. No court was in session; the clerk did not feel, so he said to me, like passing on a demurrer or an important motion. I had to do something in March, and Captain Henry was planning to take judgment by default if I had not pleaded and denied his counterclaim from stem to stern. You can smile, Mr. Henry, all you desire, sir, but I guess I will practice this side of this lawsuit as I myself may prefer. I admit that I have waived the demurrer and have waived the motion to strike, but I do not concede that I have waived the motion to elect. My recollection of the Code is that a motion to elect is never waived. I did not intend to raise any question of jurisdiction in your Honor's court. I consider that a reflection on any court, to try to take a case out of his court."

"Let me see the reply, Mr. Clerk," said the Court, whereupon the clerk bustled and hurried about in his small clerk's compartment, knocked a large order book off the railing, dropped his glasses, and finally handed the Judge a bundle of papers in the case in question. The Judge began

leisurely to scan the record before him, while Captain Henry and Judge Cole eyed each other triumphantly, each feeling great sympathy for the other, and each feeling his victory quite visibly. They were awaiting their fate, as it was apparent the Court had heard all he desired and had familiarized himself with the questions presented and was ready to announce his decision. It was thus he ruled in the case of *Dupoyster v. Blacklock*:

"Gentlemen, I have heard you with interest. I do not think such matter as is contained in the second paragraph of the answer can be properly set up in a counterclaim in this sort of action. It is certainly foreign to the cause of action set out in the petition. As to the question of waiver, that presents a serious situation" (here Captain Henry expanded his chest, with a bow of satisfaction and intelligence, while Judge Cole correspondingly slid down lower in his seat), "but I see there is as a matter of fact no reply in this record. Here is a reply in another case, that of *Harwood v. Summers*, on which Judge Cole is marked as counsel, but there is no reply here in this case. I infer that by mistake or oversight this pleading was put in these papers."

Here Judge Cole, straightening up, remarked:

"Judge, pardon me, allow me to examine my private docket. Yes, I filed that reply in that other case. I recall now that I expressly avoided replying in this case for fear I would waive something. I now demur to that answer and counterclaim."

Captain Henry was making dog-ears on the



Code and silently felt the earth gradually slipping from under his feet.

By the Court: "Let the demurrer to the answer and counterclaim be sustained and let the case be dismissed without prejudice."

The call of the docket was then resumed and all the common law jury cases set down for trial, after which court adjourned for the day.

As lawyers, judge, and court officials filed out of the court-house and assembled on the yard, Judge Cole, being in the assembly of a dozen or more, looked across the street and spied Captain Henry hurrying along, whereupon he called out to him:

"Captain Henry, come over for a moment, please. I want to speak to you about a little matter."

Captain Henry, turning abruptly, hesitated a moment, then walked directly towards the crowd, which included Judge Lowden, Judge Cole, and a dozen others. When Henry had gotten well into the circle, Judge Cole, with a serious mien and freezing dignity, said:

"Permit me to suggest that the assizes that assemble in the temple there"—pointing to the court-house—"is not the court of a justice of the peace nor a Greenwood police court; but, sir, it is the circuit court, the circuit court, sir."

### CHAPTER III

THAT evening the "feast was spread" again at old Hanna's hotel — supper, as it has been, is, and doubtless will ever be designated in this land south of the Mason and Dixon line. Commonwealth's Attorney Haggard and Judge Lowden had already found chairs under the maple on the pavement. A quiet moon swung high in the heavens and sent its silvery rays scattering through the trees. These two faithful, incorruptible, and patient public servants smoked in silence, relishing the serene and beautiful night perhaps more than conversation. Men on intimate terms can thus ignore convention with impunity. By and by Host Hanna, having performed his *pro rata* of the evening chores, came to the door of his hostelry, discovered the presence of the smokers, and forthwith joined them. He had a deep prejudice against the Anglo-Saxon word "Mister." With him it must be "Judge," or "Colonel," or "Captain," or "Major," or "Bill," or "Tom"; but "Mister" never. As is manifest, he had had no difficulties on this score regarding Judge Lowden. Not so Haggard. When that official first qualified and made his initial appearance in Greenwood Hanna was confronted with his old difficulty. He at once and without ceremony handed to Haggard, gratis, the not unusual title of "Colonel," and since that hour had always addressed him after that fashion.

"Colonel," he said, addressing the State's counsel, "do you expect to try the Dudley case this term?"

"Hard to say, Jim; but the County Attorney thinks we will be ready."

"Durned if I've ever believed that young fellow guilty," ventured Jim.

"There is grave doubt about it, but I'm inclined to fear he killed Thomas. There are some overpowering circumstances connected with it all," replied Haggard.

"Well," replied Jim, "I've been on many a jury, but if ever I hang a man on circumstantial evidence or a nigger's testimony I hope somebody will have me bored for the simples."

So ended the reference to the somewhat sensational and widely known case of Commonwealth of Kentucky vs. Hiram Dudley. Of this *cause célèbre* more anon.

"Gentlemen," resumed Jim, after a brief silence, "I desire to announce to the Court and his able prosecutor, that by a stroke of good fortune, or by reason of supposed political influence, I have a gallon of ten-year-old. Judge Hun is looking after his fences in his race for renomination for Judge of the Court of Appeals. He passed through this pasture yesterday, and right here is where he found quite a break in his fence. Is it necessary for me to remark that the gap is repaired?"

"Bear in mind, my distinguished county boss," interposed Haggard, "Judge Hun intended that

investment to circulate freely among the electorate; but I see his plans are going amiss. Do you suppose I, after my long and hot ride to-day, would spurn a real old-fashioned Greenwood toddy?"

Hanna was off on the instant in quest of ice, sugar, water, and the nectar—or poison—according to the view-point. Returning with the aforementioned ingredients, the host proceeded, with uncommon and unconcealed delight, to mix two extremely mild decoctions, it being a rare thing for either of his guests to indulge. Ere he could complete the task he heard footsteps and, looking up the pavement, saw the Master Commissioner of the Mecklenberg Circuit Court, one James Higgins, approaching.

Now, foxhounds and pointers and setters are said to have noses for things that creep and things that fly, but James Higgins, Master Commissioner, had a nose for things that flow. From the back room of some distant grocery store James had been observed suddenly to raise himself, sniff the air, and forthwith leave his companions. He made straight to the source of the aroma. But if James Higgins, Master Commissioner, could sniff from afar, James Hanna, host, could suddenly hide "licker." That is a most essential accomplishment to such of Hanna's philosophy who reside in what law books denominate "dry territory"; and Greenwood had been "dry" (in books) these many years.

No sooner, then, had Hanna realized the gravity

of the situation, which gravity consisted in the possible discovery and immediate consumption of his possession, than he had the liquor, concomitants, and all deftly hidden under his chair and was quietly and indifferently watching the majestic passage of the moon across the heavens.

"Fine night, gentlemen," ventured the hopeful Commissioner.

"Magnificent," in a duet from Haggard and Lowden, Hanna rather coldly silent.

"Balmy; but," continued Higgins, "I feel rather chilly. Guess I'm taking cold." This followed by a lamentable effort to cough.

"Higgins," said Hanna, looking at the moon and apparently oblivious to the cough, "did you ever realize what a lot of machinery is required up there to navigate that moon and all those stars?"

"Never did," replied Higgins, as if to dismiss such a foreign topic. He then took a chair just opposite Hanna and suspectingly shot a glance in his direction, as if to pierce the shadow beneath his chair.

"You ought to read up on that," said Old Jim, bringing his knees closer together, as Higgins rendered the second act of his coughing comedy.

"Mistah Hanna," called Fox from the hotel door, "you is wanted at the phone."

Have you ever, O gentle reader, seen a man drowning in the sea? Did you observe the mute but eloquent appeal in his despairing look? If so, you know something of Old Jim's despair at hearing these words. Great generalship manifests it-

self, however, in the twinkling of an eye. His discomfort was short-lived.

"Tell him," he said, "I've gone to the lodge, and to leave his number."

"Yas, sah," obeyed the handy Fox.

Now Old Jim, having barely escaped this disaster and fearing at any moment a second such danger, determined to get rid of Higgins quickly. The four rather liberal drinks he had taken since supper were calling for reinforcements, and then the whole supply was in jeopardy; not such jeopardy as arises on a demurrable indictment, but jeopardy real and actual. It was thus, then, that this high priest of the Hanna House sent his anxious and thirsty guest on his way rejoicing.

"Well, sir, if I wasn't so tired and worn out, I'd go down to Henry Dance's and make him let me in on that jug of his. Henry is a sly old fox, but when I met the night train he was there, and I saw him sign for his jug. Clever fellow, old Dance; never refused a man a drink in his life. Fact, ain't it, Higgins?"

"No doubt about it, Jim," answered Higgins, rising with assumed deliberation. "Well, gentlemen," he continued, "good-night and pleasant dreams," saying which the Master Commissioner proceeded not too slowly down the street. When he had gotten well out of hearing Old Jim drew out his safely guarded prize, remarking dryly:

"Gentlemen, both of you are wise and profound lawyers. Here's a difficult problem for you:

Which course should you take from this spot were you en route to Henry Dance's house and were total strangers in these parts?"

Amid the laugh that followed, the two lawyers sipped their mild mixture, while Old Jim took a drink that would have shamed a sailor on shore leave.

Thus ended the first night of the June term in the good town of Greenwood, in Mecklenberg County.

## CHAPTER IV

THE next day the petit or trail jury was, after the usual delay consequent upon the qualification of that body, duly empaneled and the uninteresting grind of the first trial day was begun. The Court, from the bench, patiently called the docket, while Haggard at his table looked over each indictment, taking divers and sundry orders in language unintelligible to the uninitiated. "Continued with an alias to Logan"; "filed away with leave to reinstate"; "dismissed for want of proof"; "continued with an attachment for John Hop"; "plea of guilty and a sixty dollar fine." These and other kindred orders were called out in the clear, rich voice of the State's Attorney.

After an hour or two a case was called in which all the Commonwealth's witnesses responded, and, following a brief consultation with them, Haggard uttered the words that had come to be a terror to lawyers over the district, viz: "The Commonwealth is ready." The defendant's affidavit for a continuance was held to be insufficient, and the cause was under way. The proof was heard and plainly showed that public worship had been disturbed — plainly to everybody except Judge Thompson, the defendant's counsel. He addressed the jury with his high-pitched voice. He became excited. He more screamed than spoke. He ex-



ceeded his allotted time, and was stopped by the Court.

Haggard followed in a five-minute speech that contained no surplus words. The jury rendered a verdict of guilty. A number of other causes were disposed of by order. Then followed in rapid succession the trial of a defendant charged with breach of the peace, another with selling liquor in local option territory, a railroad company for obstructing a public highway, a man charged with operating a poolroom without a license, two others for gaming. And so the day wore on, and when the hour of adjournment had arrived the Court congratulated himself upon the volume of business dispatched.

The mills of the gods do grind exceedingly fine, but they grind slowly, whereas the Mecklenberg circuit court grinds exceedingly fine and not slowly. Delays, waste of time, and waste of public money in the administration of justice through the necessary instrumentality of the circuit court are due to one agency, and one alone — the judge upon the bench. Where he, like Judge Lowden, combines the executive with the jurist, the Commonwealth profits. A judge without the capacity to expedite things, safeguarding justice at the same time, depletes the public treasury and depletes the supply of public esteem and faith in the efficacy of courts. Such a lot of judges, presiding in the fog of precedent, provoked the greatest master of the English language to scorn and despise "the law's delay." Often have they stirred a demon in

the breasts of the multitude, and, after a poor trembling wretch has been rushed to the gallows, without the intervention of court or jury, this befogged jurist wisely discourses upon the evils of mob violence. It ought to be possible to place him beneath the gallows, thus affording him the opportunity of seeing the fearful ruin he has wrought. And then with the dead wretch above and the *delaying* wretch below, two things would be together that ought to be together, viz: Cause and Effect.

You philosophers who denounce mob law, do not go hence and misquote these lines. The mob in all cases (and there are no exceptions) is but the slumbering savage within us. It is the senseless, wild, barbaric murder of one man by many. Were any member of any mob to be apprehended, his would be the loudest demand for a trial by jury in an orderly, just, and discriminating court. And yet this is the thing he is assuming to deny to a wretched, friendless culprit! But, O you philosophers and *slow* judges, who vent one hundred per cent. of your energies in denouncing the *effect*, so modify your arithmetic as to address fifty per cent. thereof to the *cause*, and perhaps the remaining fifty per cent. in course of time will come to be treasury stock which you will have no occasion to float.

And to you, brothers in the criminal practice, take this word from one of your own guild. Pray do not denounce these lines as a desire that men charged with crime be hurried to the gallows under the mere forms of law merely to avoid the

bloodthirsty demands of frenzied lynchers. There is a glorious, dignified, and happy medium. In Lowden's court you have full and ample time and opportunity to prepare for trial. The sheriff stands ready to produce all your witnesses, a jury practically of your own choosing is afforded you. You are heard patiently and intelligently on all questions; there is no unseemly haste—nor unseemly delay. There is only this one iron-clad rule of practice—*your case must be tried*. He who demands more should have less. In a long career, the best bit of advice a brilliant old lawyer ever gave to the young who drank from his wisdom was this: "Young man, learn well this phrase, 'Your Honor, I'm ready.'"

## CHAPTER V

It was past ten o'clock that night when Haggard dropped into Judge Lowden's room. The judge had repaired thereto immediately after supper to read and to prepare to decide a number of motions, demurrers, *et id omne genus*, that had been submitted, including some minor chancery cases submitted for final adjudication. His countenance was lit up by an amused expression. Observing the look of inquiry in Haggard's face, the Judge said:

"Haggard, here's a divorce suit brought by old Jumpus. Scott signs the answer as attorney for the defendant. They have taken the depositions of two witnesses. These depositions were taken before Jumpus, as examiner, to all of which he solemnly certifies. He also certifies to the credibility of the two witnesses and that Scott was present, but waived cross-examination, and that the signature of the witnesses was, by mutual consent, waived. What say you, Mr. State's Attorney, to that record?"

"Actions for divorce, being a specialty with my friend Jumpus," replied Haggard, "I can appreciate the short and speedy road he has taken to a judgment."

"Seriously," interposed the Judge, "in this case the petition is demurrable; the answer is demurrable; the attorney for plaintiff, in his capacity as

examiner, takes his own depositions; the questions are fearfully leading, the answers all transparently couched in the language of the plaintiff's counsel; everything is waived, which fact is certified to me by the plaintiff's attorney, and ——"

This sentence was not completed, for at that moment a knock was heard at the door and, responding to Judge Lowden's "Come in," in walked no less a personage than Marcellus Jumpus, Esq., attorney and counselor. With a chivalry of another age Jumpus, possessed of his usual embarrassment consequent upon coming into the presence of the Judge, said:

"Pardon me, gentlemen, for intruding myself, but, Judge, did you get that divorce case of Boggess vs. Boggess, submitted this morning?"

"Yes, I have just read the record," responded Lowden.

"There's two children in that case," said Jumpus, "and in drawing the judgment, how must I dispose of them?"

"I cannot give you a judgment in this case as it is now presented," said the Judge.

"Why, what's the matter, Judge?" inquired the unhappy attorney.

"Your petition," said the Court, "is bad on demurrer. The grounds for divorce are statutory, and the ground alleged by you is not found among those enumerated in the statute. You allege 'that the defendant is perverse and obtuse, and when the plaintiff ordered him to go and fetch a back-log he replied, "Durn the back-log, I'm going to Pond

Creek to ketch a mess of fish.”’ You and Scott can’t waive the signature of these witnesses. If that were permitted, any man and woman in Mecklenberg County could readily obtain a divorce. You, being attorney for the plaintiff, cannot take these depositions as examiner. Think how wide that would open the door. Now, let us read this deposition of Mandy Bunch; and bear in mind that you wrote the questions and answers and that you are attorney for the plaintiff seeking the divorce. Omitting the style of the case, this document reads thus:

“ ‘The deposition of Mandy Bunch, taken at the law office of Marcellus Jumpus, in Greenwood, Ky., by consent of the parties, on April 10, 18—, to be read as evidence on behalf of the plaintiff on the trial of the above styled cause, now pending in the Mecklenberg Circuit Court. The witness being duly sworn by Marcellus Jumpus, examiner, deposed as follows, examined by Marcellus Jumpus, attorney for plaintiff.

“ ‘Q. Mandy, how old are you and do you know Mike Boggess and Emma Boggess, and how long have you known them?

“ ‘A. Thirty-six; yes; ten years.

“ ‘Q. Is it not a fact that Emma has always conducted herself as a proper wife, in all respects, and is it not a fact that Mike is trifling and no account — and has been a long time?

“ ‘A. Yes, sir.

“ ‘Q. State whether the act of divorce set up

in the petition occurred in Mecklenberg County, and within five years before this suit was filed?

“‘A. Yes, sir.

“‘Q. I’ll ask you if Mike spends his time fishing in Pond Creek or in looking after his family, and will get you to state if he is a poor provider?

“‘A. Yes, sir.

“‘Q. Were you present at his house in February last, one day, when Emma ordered him to bring some stove wood? If you say you were, isn’t it true that he refused to get it and went off fishing? State fully about this?

“‘A. Yes, sir.

“‘Q. If you know any other facts about this case, please state them in your own way?

“‘A. Don’t know any more.

“‘Cross-examination waived.

“‘I, Marcellus Jumpus, an examiner in and for Mecklenberg County, Kentucky, hereby certify that the foregoing deposition of Mandy Bunch was taken before me at the time and place mentioned in the caption. That I wrote the questions down as asked by plaintiff’s attorney and took down the answers of the witness. The plaintiff was present in person and by Attorney Marcellus Jumpus, that the defendant was not present, but was represented by his attorney, William Scott. That the witness Mandy Bunch is a person of good moral character and worthy of belief under oath.

“‘Witness my hand as such examiner this  
April —, 18—. MARCELLUS JUMPUS,

“‘Ex. M. Co., Ky.’

"Now what do you say the Court should do in this case, Mr. Jumpus?" concluded Judge Lowden.

"I told my client," said Jumpus, "that there were some close questions involved in this case when I consented to bring the suit. Just pass it in the morning, Judge, and I will think over it," after which Marcellus rather sheepishly bowed himself out.

Haggard, who during this recital had been quite buried in the pillows on Judge Lowden's bed, to which retreat he had been drawn to avoid an explosion, now banished all levity and wore a serious mien.

"Judge," said he, "isn't that a commentary, a sad commentary, on the caliber of the profession in Kentucky? How is such a thing possible in this enlightened age in this great State?"

"There's no difficulty," replied Lowden, "to ascertain the cause of the trouble. It is our worthless and archaic system of laws regulating the requirements for admission to the bar. Jumpus is not alone in this district. Every county has its Jumpus — one, two, and some of them more than two. An unlettered, unprepared fellow loafs about the court-house, absorbs a smattering of court procedure, and concludes he must practice law. The county judge promptly gives him the required certificate of good moral character. He makes his application. The circuit judge, obeying the statute, appoints two lawyers to examine him touching his knowledge of the law and the practice thereof. They go through the forms and report him quali-



fied; hence his license, hence Jumpus, hence this record here — Boggess v. Boggess.”

“To all of which,” added Haggard, “I can only repeat the first observation — a sad commentary. There is a consolation in knowing, however, that their sphere for disastrous operations is limited. Few people retain them.”

“Very true,” the Judge replied, “but some do — once.”

And the two men lapsed into thought and said no more.

Since the night this very usual and ordinary occurrence took place — some years since — the General Assembly of the Commonwealth of Kentucky, at the urgent behest of a group of far-seeing, State-loving men, threw off the lethargy of years’ standing and smashed the old system, providing in its stead an adequate and thorough means of testing the qualifications of each applicant for admission to the bar before he should be let loose on the public. The new law passed both Houses of the Legislature by practically a unanimous vote, and a new day had dawned. Henceforth lawyers, like unto physicians, surgeons, dentists, even undertakers, must be qualified to practice before being suffered to do so. But the delight of the Commonwealth was short-lived. A Governor — himself a lawyer — vetoed the measure, delivering some incoherent excuses, among which was this: The new law worked a hardship on the *country boy*, which, on being interpreted, means that the *country boy* cannot prepare himself. While comparisons are

odious, and the metropolitan lawyers are admittedly among the ablest in the State, the annals of the Commonwealth from infancy will bear witness to the achievements of her country youths, who have adorned the bench and illuminated the bar. The so-called *country boy* may desire protection, but not such protection as demands the sacrifice and surrender of his self-respect.

## CHAPTER VI

THE next morning at nine o'clock the court was convened with usual promptness. The minutes of the previous day's business were read by Tom New (the clerk that always led to the belief that Novelist Dickens lived in vain). Had Tom a score of deputies they should not read *his* minutes. He could not forego that wise look over his glasses when he finished the line "ordered that court adjourn until to-morrow morning at nine o'clock."

Motions were called for, the Court addressing each member of the bar separately.

"Yes, your Honor," responded Judge Thompson, when his name was called, "I have a motion."

He then proceeded to explain the status of some case, after which explanation the Court inquired as to what his motion was. Thompson replied that he wanted to file so-and-so later in this term. This procedure occurred every morning at motion hour throughout every term. Judge Cole also had a motion. He arose, holding in his hand two prepared pleadings, one of which he filed, and was in the act of filing its fellow when it occurred to him to "save the other one for to-morrow." He took his seat abruptly. Colonel Stevens and Tom Henderson briefly argued a demurrer in some railroad case. Captain Henry filed what he termed an answer as "gardeen ad litem." Tobias Mathews filed two separate reports as attorney for non-resi-

dent defendants. Jumpus asked leave until the next term to file an amended petition in *Boggess v. Boggess*. Judge Yust of Madisonville, a very towering oak of a man, a giant in frame and in intellect, moved for a rule against the Master Commissioner, to show cause why he had not executed a certain order of distribution made at the previous term. A half a dozen other attorneys, who were interested in the same matter, joined in the demand, by spontaneous acclaim, each looking daggers at the Master Commissioner.

Now James Higgins, Master Commissioner, is the same James Higgins who, on an occasion of which the reader has been heretofore advised, went off to Henry Dance's in search of Jim Hanna's will-o'-the-wisp. Some of his characteristics were made manifest on that occasion. But he had others. He was a living, walking apology, and courtesy was his monomania. His courtesy was not the ordinary kind observed in general; it was rather intermingled with gallantry, chivalry, and Chesterfieldianism. This characteristic had been more pronounced at this term of court than ever before, in view of the fact that Higgins had heard certain well-defined and distinct mutterings emanating from certain other politicians, who had intimated that no man should hold the office of Master Commissioner *forever*. There were some vague expressions about the ancient and time-honored doctrine of democracy—"rotation in office"; mutterings about rewards due other boys in the trenches. Also, let it be said, in that wonderful

organization and brotherhood known as "statesmen who keep their ears to the ground," James was the chief high priest. No tremor or rumble or quake, howsoever slight, ever failed to be registered on his seismograph.

Now, from all of this it will be seen at once that if James had been a Chesterfield prior to the hearing of these distant rumblings, after hearing and thoroughly grasping their meaning, why, may it please the Court, he became simply two Chesterfields. When Judge Yust, who on occasion could look the part of the Colossus of Rhodes, moved for this rule, and in a chorus six or seven other lawyers joined in the demand, Higgins, whose official efficiency was already in the limelight, immediately put on his most humble and apologetic countenance.

"Your Honor and gentlemen," he began, "I must humbly beg your pardon. I'm a gentleman. Your Honor is a gentleman. You are gentlemen. We are all gentlemen. I've been Master Commissioner of this honorable court for years,"—then reflecting a moment—"for a *few years*, I may say, and if I have ever done an unkind thing I do not know it. Judge, I try to do my duty. Does your Honor know of any more faithful public servant? I believe in the doctrine announced and promulgated by that peerless, matchless, unsullied Nebraska who ——"

Here Judge Lowden, realizing his drift, interrupted Higgins. To the auditors who knew him it was evident he was bent on burying in oblivion the

oration Cicero delivered on the Conspiracy and the one Demosthenes delivered on the Crown.

"Mr. Higgins," said the Court, "you will have to make a written response to the rule, in the regular way. The Court cannot take the matter up in this manner. Mr. Clerk, give me the criminal docket."

And that day's grind began.

Before any of the regular criminal trials were begun, Marcellus Jumpus announced that there was a lunatic present "who desired an inquest into his insanity." The court concluded to dispose of the case at once, rather than keep the unfortunate defendant waiting. Accordingly, the demented one was brought to the bar and a jury called. The defendant, Nat Mann, seemed rational. He had an aged, feeble appearance, but gave no outward or visible sign of distressed mentality. While the jury were being qualified, Jumpus went over and talked with Mann. Judge Yust, who had been called out of the court-room during these preliminaries, returned and entered the bar just at this stage of the proceedings.

"Judge Yust," said the Court, "we are going to hold this inquest. Will you represent this man?"

Yust, as quick as a flash, said in a stage whisper:

"Who is it, Jumpus, or the other fellow?"

After the waves of the convulsion induced by this shaft had subsided, the trial began. At first it seemed from the evidence that Mann was demented, but when Yust (who had read Mr. Charles Reade's "Hard Cash") proceeded to cross-exam-

ine the witnesses and put Mann on the stand and question him, the oft-repeated sham and farce was laid bare — another effort to incarcerate an undesired, feeble, useless relation in a mad-house. The jury promptly found the defendant sane. The last Judge Yust heard of the case was Jumpus, with much gesticulation, trying to explain to his client — the son-in-law — how it all had transpired.

Thus the court plodded on through the day, and when evening came the docket had been cleared of many cases. Indeed, the court was up with the docket, and it was announced that the case of Commonwealth vs. Hiram Dudley, charged with murder, would be the first called the next day.

## CHAPTER VII

TEN o'clock that evening found Judge Yust, "Colonel" Haggard, and Judge Lowden in the latter's room at Hanna's hotel. Relating sundry professional experiences, exchanging anecdotes apropos of laws, lawyers, and law courts, as is the wont and habit of the guild where two or three are gathered together, they had spent a delightful hour or two in triangular communion. Judge Yust, a native of Mecklenberg County, who had removed from its historic precincts only a few years previous, was surcharged with localisms and was a veritable prince of story-tellers. There are lawyers of eminence and pronounced success,—as lawyers,—but place them on a social occasion among such men as Yust and lo! you have a pig, an owl, a mule.

Yust was one of creation's rare combinations. In chancery he was at home; before the inscrutable twelve he was adroit, persuasive, dangerous; at work he was a worker, at play a player. Perfectly at home in a company of profoundest scholars, he was equally at ease among the unlettered and unlearned. In youth he had read and comprehended Saint Paul's adage, and it had served him many a good turn in his long and picturesque career at the bar.

He had just concluded an anecdote applicable to James Hanna, Esq., when that dignitary, without ceremony, protruded his blond head in the door,



hesitated for an instant and then entered. Jim made it a rule *not* to knock before entering, in his hotel. He took the ground that the landlord, *ex-officio*, had the right of entry, and the right of ingress and egress, to and from any part of the hostelry over whose destinies he presided. Surveying the company assembled, he said:

"Fools rush in where angels fear to tread. Judge, have you plenty of water? Do you want anything? If so, ask and it shall be given unto you."

"Nothing, Jim, thank you," responded Lowden, as the host dropped into a chair and proceeded to replenish his cob pipe. The Judge, without Hanna's vision, displayed four fingers of his right hand to Yust and Haggard, a signal quickly understood by those two old acquaintances of Hanna's. The signal, on being interpreted, had this meaning: the Judge knew from the tone of Jim's voice, the flash of his eye, and his general demeanor that the keeper of the Hanna House had had just four drinks of spirituous, vinous, and malt liquor. These four and no more always oiled the tongue of this rare and brilliant rough diamond. Sentiment and romance at once fairly oozed from his pores. His assembled observers congratulated themselves on the prospect of an Hannaesque story.

Their prognostications were not without foundation. Judge Lowden, with a knowing wink in the direction of Haggard and Yust, said, with solemn countenance:

"Jim, you drink too much whisky."

"That's what Mrs. Hanna says," replied Jim. "Peculiar how penetrating minds run in the same error."

"But," insisted Lowden, "it's all your imagination. What good do you get out of it?"

"Judge," said the lectured one, after an appreciable pause, "the thing is efficacious. The transformation that a good drink of good liquor will work is wonderful. I've seen that illustrated a thousand times. Did I ever tell you"—here his face lit up—"my experience with old Uncle Si David, which occurred in my race for the Legislature years ago?"

"No, let's have it," chorused three voices simultaneously.

Hanna refilled his pipe, cleared his throat, pulled his somewhat frayed blond mustache, leaned his cane-bottom chair against the broad bedpost, and thus was related his experience with old Uncle Si David:

"Well, sir, before I reached the age of wisdom and at a time when I was mentally deficient, I was seized with an ambition to represent Mecklenberg County in the State Legislature. You wouldn't look at me now and think I ever had such notions, but I did. It's true I got beat, but that's not the first time the great common people made a fearful blunder; nor was it the last, present office-holders excepted.

"Well, to make a long story longer, I made a canvass over the county, one of these house-to-house kind, and I think I saw every voter in the

county except a few. Since that election I have always believed those few were the ones who voted for me. In the course of that canvass I met many kinds of characters and had many experiences. I have never forgotten old Uncle Si David. He lived, Judge, out here on the Russellville road and had been a power in his bailiwick. I think his health had been bad for a year or so, at least I hadn't heard anything of him for several years, until one cold, wet, gloomy day I met him in the road when I was making my race. The mud was hock deep, the drizzling rain was cold and incessant, and it was about the gloomiest day I ever saw. Uncle Si was riding one of these little sway-back, gimlet-tailed mules, which was floundering along through the mud depressingly. Uncle Si's face was long and he looked to me as if he hadn't smiled in ten years. It occurred to me that I had better 'lectioneer with him, which I proceeded to do.

"Now, gentlemen, be advised that I had a flask of twelve-year-old in my saddle pockets — the self-same despised article Judge Lowden was just abusing.

" 'How are you making it, Uncle Si?' said I as cheerfully as possible.

" 'Mighty poorly, Jim, mighty poorly. Look at those clouds; damned if it ever is going to stop rainin'.

" 'I'll ride a piece with you,' said I, 'if you don't object. How's the world treating you, Uncle Si, these days?'

" 'Mighty hard, Jim, powerful hard,' said he.

'Luck is eternally agin me. Listen at that rain! Ruin every year of corn I've got. Jim, you know that black mare mule I bought at Duke's sale there in Greenwood four years ago? Well, she's had the distemper, and it's gone to her eyes and she's dead sure going blind. And that foxhound, Top, damned if he didn't hang hisself on the paling fence and died the next day. Tobacco ain't bringing no price at all, and I've got ten thousand pounds hanging up which ain't worth strippin' out and deliverin'. Did you ever see a rainy spell hold on as long as this one? Durned if I'd recognize the sun if it was to come out. And there's that idiot daughter of mine, Jim, she gives me and her mammy a world of trouble. Helpless critter—can't do nothin', and keeps her mammy runnin' after her all day. And my boy Tim—strong enough, but he don't seem to ketch on to farmin'; but when the world is dead agin a man he ——'

"Uncle Si never finished this sentence, for at that minute his mule suddenly went into the mud almost to his belly, very nearly throwing the old man from his saddle.

"'Dad blast your infernal time,' said he, 'I've got a notion to break your damned thick head with this single-tree,' which weapon the old man brandished.

"When Uncle Si's mule pulled out of the mud, we found ourselves very near a big oak tree, and as the rain was coming down like putting out fire we stopped under it, hoping it would hold up. Drawing out that flask I said to Uncle Si:

“ ‘Would you like to have a drink of this liquor?’

“ ‘I could see him brighten a little.

“ ‘I believe I will take just a small taste, Jim,’ says he. He took the flask and, gentlemen, I’ve seen big drinks in my day, and when pushed I can take a fair drink myself, but that drink of Uncle Si’s is in a class all to itself. After he had swallowed it he smacked his lips, cleared his throat, and sat down on a log, holding the bridle of his mule.

“ ‘Having some anxiety as to the ration supply, I took a swallow myself. Well, in five minutes Uncle Si’s ill luck began to turn.

“ ‘Jim,’ says he, ‘the clouds are breaking off in the west. Look at that piece of blue sky over yonder.’

“ ‘And then he said, ‘Where’s that flask?’ I handed it over to him, and drink No. 1 lost its reputation with me, being eclipsed by drink No. 2. We were silent for some time and then Si said: ‘It ain’t but few cases of distemper that puts a mule’s eyes out. They do go blind occasionally, but it’s powerful rare, powerful rare.’

“ ‘Maybe it don’t ever happen,’ I said.

“ ‘Well, I have even heard that said by good veterinarians,’ he added, and getting up from the log, Si mounted his mule, saying, ‘Let’s be going on, Jim; it ain’t rainin’ much. But before we go, I’d like to sample that lick once more.’

“ ‘I handed him the flask and inwardly felt a sympathy for the reputation of drink No. 2. My guess was correct, as the old fellow emptied it to

the last drop. We rode on in the same mud, under the same black sky, in the same cold rain.

“‘Jim,’ says he, ‘you see that tract of fine land over there? I think I’ll just buy that in the spring. That boy Tim of mine ought to have a farm. He’s just naturally a farmer. Him and me differs sometimes about things, but it’s ten to one he’s right and I’m wrong. Gosh, he could make that dirt bloom like flowers!’

“I said nothing to this and on we rode.”

“‘Jim,’ he continued after a pause, ‘do you know this is about the best season I ever saw to put up tobacco? It’s damp and in fine order. My neighbors have got it in their heads that it won’t bring much this season, but I doubt that a whole lot. I know one thing dead sure — there’s a light crop in Virginia and Tennessee, and I wouldn’t be afraid to gamble on the price soaring by early spring. My, but this good rain will be fine for wheat!’

“The old fellow looked the picture of contentedness, and I didn’t care to do any of the talking.

“‘Jim,’ says he, ‘you know that hound that hung hisself on the fence? Well, sir, he was old and wore out, and I would have had to kill him this spring, anyhow. He’d done played out, and it was about the best thing that could have happened. Mandy’s cousin Eph has got a bitch,— one of the best that ever hit the woods,— and she’s going to have a litter of pups next month. Eph said I could have two of ’em. They’re by the best dog in these parts.’

“‘Uncle Si,’ said I, ‘you are an old experienced farmer,—do you think all this wet weather will hurt the ungathered corn?’

“‘No danger, Jim,’ he said; ‘corn that’s matured and is as firm and solid as this year’s crop won’t know it rained. That reminds me, that idiot daughter of mine is to help me haul some corn tomorrow. Jim, that girl is the biggest help about the place you ever saw. I sometimes reckon it’s the best thing for me and Mandy that she is ’er idiot. If she had sense there would be a lot of no ’count boys hangin’ ’round her day and night. As it is, she is company for her mammy and you don’t know how much she does about the place every day. There ain’t a man in Mecklenberg County that can beat her shellin’ corn. Well, Jim, here’s my turnin’ off place. I’ve got to take this single-tree to the blacksmith shop. Luck to you. I’m for you, and will make all the boys turn out.’

“We stopped, said good-by, and Uncle Si rode on down the narrow lane in the deep black mud, the rain-water dripping from his clothes. When he got about seventy-five yards down the road he turned in his saddle and hallooed to me:

“‘Jim, don’t wear yourself out in this race. ’Tain’t necessary; you’ve got it won hands down.’

“And the old man passed out of my sight. Gentlemen, that’s been a long time ago, but I can see old Uncle Si now as plain as if it was yesterday —

“And yet the Court here says it’s all imagination.”

## CHAPTER VIII

WHEN court convened the next morning the attendance of the public had been so augmented that there was scarcely a vacant seat remaining in the room. The Dudley murder trial was the drawing card. The sheriff had diligently executed the various processes for both the State and the defendant, summoning their witnesses, of whom there were not a few. Friends and relations of the defendant and of the murdered man supplemented the attendance considerably. There was the usual hush and expectancy that is always incident to a momentous trial. Speculations and expressions of guilt and innocence were whispered. The defendant's wife, a sweet-faced little woman, sat meekly and almost tearfully near the defendant's counsel table. Two little boys, aged six and eight years respectively, sat one on either side of her. Each swung his cap to and fro and looked somewhat cowed by the pressing, staring sea of strange faces. At intervals the mother would gaze at her two boys with infinite tenderness and draw them closer to her. Imagination took wing at the sight of this young woman clinging to her two brown-haired, brown-eyed sons. Her husband had been in the Mecklenberg County jail for some months. You could not reject the mental photograph of this wife and mother many a desolate, miserable night looking long and tenderly at those two brown heads on the same pillow, the



father penned in an iron cage charged with *murder*. Gentle, tender young wife and mother, if you have courage, prepare to employ it now, thine hour of sore travail is come.

Back of the prosecutor's table were banked the *other* wife and the *other* children — widow and orphans of the murdered man. Haggard was in his seat, and in his rear sat the County Attorney, who, by virtue of his office, assisted in the prosecution. The countenance of the Commonwealth's Attorney presented problems impossible of understanding. He was seen to gaze long and intently at Mrs. Dudley and her two handsome boys. A look of indefinable pathos, short-lived as a meteor, swept across his face, only to be succeeded by his customary calm, impenetrable expression.

While the orders of the previous day were being read, Henderson and Brownlow, counsel for the defendant, entered and took seats at their table. All eyes were turned toward Tom Henderson. He had a fatigued, weary appearance, as if a great weight rested on his fine, broad shoulders. It did not require an excessively penetrating mind to fathom the fact that this lawyer had not slept many hours the night previous. Brownlow seemed nervous, while Henderson appeared tired, and Haggard impenetrable and fathomless.

"Commonwealth v. Hiram Dudley, indicted for murder," said Judge Lowden. "What do you say for the Commonwealth, Mr. Haggard?"

"Your Honor, I'll ask the sheriff to call these witnesses."

The sheriff did as directed. All the State's witnesses, with a few exceptions, responded.

"May it please the Court," said Haggard, "if your Honor will indulge me, I will ask for a few minutes to talk to these witnesses before I announce."

"Very well. Messrs. Henderson and Brownlow, the Court suggests that you call your witnesses and confer with them while Mr. Haggard is out, in order to save time," directed Lowden.

"Certainly, your Honor," said Brownlow, rising and handing a list of names to the sheriff, who proceeded to call them. Remarkable to state, every witness answered. This case had been continued at the last term, and these gentlemen knew another continuance on their motion was well-nigh out of the range of things possible. Accordingly, they bent every effort to "get ready," determined to have it out and over with. Henderson and Brownlow thereupon retired, followed by a great horde of witnesses.

After a time the assembled spectators grew restless in waiting. The Judge quietly read a newspaper, as if unmindful of the unpardonable inconvenience the onlookers were suffering. After so long a time Messrs. Henderson and Brownlow filed back into court, followed by those who had gone out with them. They took their seats. Presently Haggard walked briskly in, conferred with the Court in a whisper, and took his seat.

"Mr. Jailer," said the Court, "bring out the defendant."

The jailer hobbled off to execute that order, and a deep and penetrating silence fell throughout the room. At each noise heard at the door the audience turned and stared to catch a glimpse of the prisoner. There were many false alarms. Finally the jailer appeared, and by his side walked, with head erect, Hiram Dudley. He went straight to his wife and took his seat at her side, just in the rear of his attorneys. He smiled bravely at his little family. They had breakfasted with him in the jail that morning. He looked for an instant into the faces of his two boys, and something glistened in his eyes, but only for a second's time. Then he whispered in his wife's ear, and she smiled faintly.

Hiram Dudley, a young Mecklenberg County farmer, was thirty-four years of age. He was slightly over the average height, with clean-cut features, a rather finely shaped head, dark brown eyes, and a chin that at once challenged attention for its indication of strength.

"What do you say, Mr. Haggard?" said the Court.

"The Commonwealth is ready," replied the State's Attorney.

Mrs. Dudley remembered those four words years after all these things had transpired.

"And you, gentlemen?" said Judge Lowden.

"The defendant is ready, your Honor," replied Henderson.

"Mr. Clerk, draw a jury," ordered the Court, and the celebrated case of the Commonwealth v. Dudley was under trial.

Twelve of the regular panel were called and took their seats in the jury box. After being duly sworn, they were interrogated by the State's Attorney. One was a distant relative of the accused, two others had formed and expressed an opinion, and another had formed an opinion from current rumor, but did not recall whether he had expressed it. The four were excused on peremptory challenge. Their places being filled, the interrogation was resumed. One of the questions put by Haggard struck cold the beating heart of the defendant's wife.

"In a case," said he, "where the law and the evidence justified it, have you such conscientious scruples against capital punishment as would prevent you from returning a verdict of guilty and fixing the penalty at death."

"Ask that again, please," requested a rather timid-looking juror. The question being repeated, he said, after a visible pause:

"I couldn't hang a man."

"Challenge for cause," said Haggard.

"Sustained; stand aside," said the Court.

Another juror had the question repeated. He said it would require "mighty clear evidence; but if he's proved guilty, I could do it." Henderson made a note of this. Finally after more questioning and the excusing of one and examination of another juror, Haggard and the County Attorney conferred with the murdered man's widow, and Haggard said in firm voice:

"The Commonwealth accepts the jury."

By the Court: "What do you say for the defense?"

"We desire time to confer, your Honor," said Brownlow, whereupon Brownlow, Henderson, Mrs. Dudley and, the Court consenting, Dudley accompanied by the jailer filed out of the court-room and repaired to the County Clerk's office, which was located in another building on the court-house square. When the party reached their room of consultation it was agreed that Brownlow, Dudley, and Mrs. Dudley should remain there and look closely over the jury list, while Henderson should hasten to Jim Hanna and consult him.

"He knows more," said Henderson, "about the private lives of these men than all the lawyers in Greenwood combined," and he hastened out in quest of Hanna. He found him drawing a bucket of water from the well in the rear of his hotel and, beckoning him to a room, the two at once repaired thereto.

"Want a little drink?" said Jim.

"Drink! Hell, no, man, not now! I want to go over this jury list. The Commonwealth has accepted this jury"—showing the list—"in the Dudley case, and some of them have got me stumped."

"Awful lot of hanging fellows on there, Tom," gravely said Old Jim.

"Oh, Jim, cut out your jokes. This is no time for nonsense. I want you to tell me all you know about these fellows. I'll begin at the top. How about Squire Henry?"

"Don't take him," asserted Jim.

"Why?" asked the lawyer.

"He was a justice of the peace for twelve years," replied Jim, "and they always develop into the strongest prosecutors. Every man arrested is always guilty with them. Scratch him."

"Well, how about Henry Rhoads?"

"Well, Henry is a good sort of a fellow. Hasn't got much strength, apt to go with the majority of the jury. I don't believe he would ever sign a death verdict. I'd take him."

"There's Joe Walker," continued Henderson; "he's a former client of mine, and we are good friends."

"Is he the Walker that lives down here beyond old man Harbison's on the Madisonville road? Yes? Well, don't take him. He had an older brother killed in a brawl twenty years ago, and he spent a small fortune trying to convict his slayer, but never succeeded. He would likely want to convict."

"Well, what do you say to Tom Spruce?" asked Henderson.

"Did Haggard accept that fellow?" asked Old Jim. "You don't tell me! You take him quick. He had a row with Jack Thomas a few years ago, something like the fuss Dudley had with him. It was about a division fence, and they quarreled over it for years. Take him? I should say so."

"Bob Gaines?" inquired the lawyer.

Hanna pondered briefly and said slowly:

"I'd accept him. He was arrested once and

tried and acquitted. It was a small offense, and the evidence against him was nearly all circumstantial. They will have to cite him with their circumstantial evidence."

"J. H. Howley, Mrs. Dudley knows him well, and we are going to accept him. W. T. Baxter — what about him?" asked Henderson.

"Well, he's a negative quantity himself, but he's a cousin of Spruce, and will do whatever Spruce does. Take him."

"Ed Oats looks like a level-headed fellow to me?" inquired Henderson.

"Take him. Haggard has forgotten it, but he had a son in trouble here a few years back, and Haggard prosecuted him like the devil. Ed couldn't agree with any argument of Haggard's, ever."

"I know," said Henderson, "we don't want George Garvin. He is too thick with the Thomas family. The next is I. D. Burgher — what of him?"

"I hardly know about Burgher," said Jim. "Let's see. I. D. Burgher. He's a great Baptist, and all of Dudley's folks are Baptists. He's a clean man, a kind-hearted sort of fellow. I believe I'd take him."

"What about Buck Sawyer? I don't even know him," asked Henderson.

"Sawyer," said Hanna, "hasn't lived in this country long. He came from Logan about six years ago. He has a young wife and two tow-headed boys just about like Dudley's."

"I noticed when he was questioned," said Henderson, "he begged the judge to excuse him; that struck me. I think we will just accept you, Mr. Sawyer. Now here's the problem—Captain Vance. What do you say about him, Jim? Remember, he is a strong-willed man."

"Now there is a problem," essayed Old Jim, as he knit his brow. "One thing is sure. He'll control that jury. If he's for you, you are in the clear; but if he is against you, it's hell to pay. I remember once he was on a jury here in a damage suit. When they went out they stood eleven to one against him, but in three hours they filed in with a unanimous verdict, his way. Let's see, let's see," reflected Hanna. "His daughter married a Weir; there's no connection there. One of his boys went off to Texas, one married a Gordon, and had some kind of trouble—divorce maybe. The old Captain had a terrible suit here with the Greenwood National Bank. My, he was bitter! Oh, yes, Jackson's brother-in-law was a director in that bank, and I've heard that before the War the Captain had some kind of trouble with a woman. I imagine that evidence was mostly circumstantial. But, you know, he was foreman of that jury that gave Bud Henson the limit. That was a strong case of guilt, though. Let me see. Tom, damned if I wouldn't take him, if it was me," concluded this master of this rare and devious art of selecting a jury.

"Thanks, Jim, that's the twelfth man," and Henderson hurried to the Clerk's office. On reaching



there Brownlow remarked that the Court had sent for them. A hurried comparison of conclusions was had, and the party filed into court.

"The defense will excuse T. J. Henry, Joe Walker, and George Garvin," said Henderson, addressing the Court.

The County Attorney shot a pleased smile at Haggard, who sat impenetrable. Brownlow caught the smile. It made him nervous. He said to Henderson,

"Whom could we have left on that jury that tickles the other side so much?"

"Don't know," muttered Henderson; "one thing certain, we know more about that panel than they do."

Three new jurymen were called and examined. The State excused one. Another was called and disqualified himself. He had an opinion. The next qualified and, after consulting, the State again accepted the jury.

The defendant's counsel held a whispered conference. They were fully satisfied with two of the three last called, but were perplexed as to Jason Barrow, a sphinxlike fellow who betrayed nothing in his countenance. Jim Hanna had carelessly wandered into the court-room, which fact was unknown to Henderson and Brownlow. Brownlow was inclined to accept Barrow, while Henderson was tortured by grave misgivings. While thus in doubt Henderson felt a nudge, and on turning was handed a small bit of the margin of a newspaper, on which was scrawled these

words: "Scratch Barrow; he'll ruin you." It was unsigned. Henderson clandestinely looked about him and surveyed the audience. He discovered Hanna, who gave him a significant nod. Then followed another conference with Brownlow, after which Henderson said:

"We excuse Mr. Barrow."

"Call another, Mr. Clerk," ordered the Court.

"That exhausts the regular panel, your Honor," responded the clerk.

"Mr. Sheriff," said Judge Lowden, "summon a by-stander."

The sheriff gazed scrutinizingly over the throng of masculine faces present, hesitated, and called out:

"Come around, Mr. Agnew." That gentleman, who was seated in the rear of the room, arose and, with screeching new brogans, that screeched and screeched and screeched with his every step, came forward. He was sworn, qualified, and quickly accepted by the Commonwealth.

"Judge," spoke up Henderson, "I hope your Honor will pardon me, but I'm called to the telephone for a moment."

O Henderson, in this thou art a liar, but a kind Providence will doubtless hold thee guiltless, so great and terrible is the battle thou art engaged in!

Henderson being told by the Court to return as quickly as possible, hurriedly left the court-room, sending a knowing look to Old Jim Hanna as he passed out. Hanna, with excellent *sang froid*, liesurely walked out of the court-room, the most

indifferent mortal conceivable. At the door Henderson nervously seized Old Jim's coat-sleeve, saying:

"What on earth do you know about this Agnew? Dudley doesn't like his looks."

"Nothin'," vouchsafed Hanna.

"I don't propose to accept a juror," replied Henderson, "when I'm absolutely in the dark."

"Bob Jenkins over there came from Agnew's neighborhood—suppose we go to the store and ask Bob?" suggested Hanna.

The two men hurried across the street and found, on inquiry, that Jenkins was in the courtroom attending the trial. He was hurriedly sent for and at once joined them.

"Bob," said Hanna, "that fellow Duke Agnew, who has been called as a juryman over there, didn't you come from his neighborhood?"

To which Jenkins replied in the affirmative.

"Well," said Hanna, "would you take him as a juryman if you were in Tom Henderson's place?"

Jenkins hesitated and seemed embarrassed. He then suddenly said:

"Come back here, Jim," and the two men drew apart from Henderson, engaging in a whispered colloquy. Presently Hanna rejoined Henderson, took him by the arm, silent the while, and the two men left the store. When they had gotten well out of Jenkins' hearing Hanna said:

"He made me swear I'd never tell you, but that damned scoundrel Agnew stayed all night with Jenkins last night and told him confidentially that

Dudley was as guilty as hell. Now what do you think of that?"

"What a close call!" was all the staggered advocate could say.

When Henderson returned to the court-room and had resumed his seat Brownlow arose and said the defendant would excuse Mr. Agnew.

"Summon another by-stander," ordered the Court.

The sheriff duplicated his former "gaze and think" scene, and summoned Mr. Buskill. Buskill was opposed to capital punishment, and was excused. Mr. Mansard was summoned. The State challenged for cause. The defense objected. His qualifications were argued. The Court finally sustained the prosecution, and Mr. Mansard was excused.

Mr. Turley was called. Hanna was now sitting near Henderson. While Turley was being sworn, Hanna leaned toward Henderson and whispered, "Take him without fail, I can't explain now, but you must have him on that jury. I'm afraid, though," he added, "Haggard will excuse him."

"I will try to dust Haggard's eyes," said Henderson.

Haggard began to interrogate Mr. Turley. Almost immediately Henderson broke in, and, interrupting Haggard, said to the venireman:

"I did not understand your answer to Mr. Haggard's last question. What was it?"

Turley repeated his answer, whereupon Hender-

son fairly leaped on him, making, apparently, a desperate effort to disqualify him. He questioned and cross-questioned him, but elicited no legal reason why he should not sit as a juror. Then to complete the feint Henderson, with grave mien, said:

"We challenge Mr. Turley for cause."

"Overruled," responded the Court. "What do you say to the jury, Mr. Haggard?"

"The Commonwealth accepts the jury, your Honor," replied the prosecuting attorney.

"And so do we, your Honor," quickly retorted Henderson.

Haggard saw in a flash how skillfully the trap had been set, and how speedily and unconsciously he had fallen into it. He had accepted Turley because Henderson's questions and challenge led to the impression that the defense did not want him under any circumstances. Lowden saw it all. He could not but admire the consummate skill Henderson had employed in trapping the able prosecutor. Haggard bit his fine, thin, tightly compressed lips, and perhaps inwardly and bitterly resolved to have his vengeance before the end of the trial.

O Haggard, do not chide yourself for this error! You are a great criminal lawyer, but in this master science in which you are engaged the great and the small, the giants and the pigmies, all must take sword thrusts. Sometimes they are pinioned fatally, again they recover and draw. Deity has accomplished many things, but as yet no brain has been constructed, in this or any other age or clime,

that surely could call itself master of this vast, illimitable, boundless thing — the law.

“Swear the jury to try the issue,” were the words from the bench that broke in on Haggard’s reverie, and Hiram Dudley was in jeopardy.

“Oyez! oyez! court now stands adjourned until one o’clock,” followed after the jury had been admonished and put in the custody of a deputy sheriff.

## CHAPTER IX

At one o'clock actors and spectators in this drama were all in their places. Following the usual brief formality of opening court, the roll of the jury was called. Henderson then asked for the rule — that is, the separation and exclusion of the witnesses from the court-room. This motion, as a matter of course, was sustained. All of the witnesses were required to stand, were duly sworn, admonished, and directed to keep without the hearing of the court, but to remain in calling distance. They sourly and gingerly left the court-house, much to the gratification of certain spectators, who now had comfortable seats.

"Read the indictment, Mr. Haggard," said the Court.

Haggard arose, holding a single piece of paper in his hand.

"May it please the Court and you gentlemen of the jury, I will read this indictment." Then followed the formal charge couched in simple language. Mrs. Dudley caught only certain words, such as "offense of murder" and "willfully, unlawfully, feloniously and with malice aforethought," "shoot and kill one Jackson Thomas," "leaded ball or balls," "a year and a day," "against the peace and dignity of the Commonwealth of Kentucky."

"To all of which," Haggard continued, "the defendant enters a plea of ——"

"Not guilty," said Henderson.

"And," continued Haggard, looking at Henderson, who nodded his head affirmatively, "waives formal arraignment. Gentlemen, it is sometimes my custom to make an opening statement on the beginning of a trial such as this. However, I shall not do so on this occasion. I shall only say that from the evidence you will hear you will see laid bare a fiendish, foul, cold-blooded, and cruel murder. The defendant, in the night time, like an assassin, shot and killed Jackson Thomas, a citizen of your county. He was killed in the very prime of life, in the very bosom of his family. The poor fellow was beneath his own vine and fig tree, joyous with his wife and children about him, and was brutally murdered, without a chance to defend himself — shot down like a dog, his very bowels being scattered over his hearthstone. The great State of Kentucky demands at your hands that this cowardly assassination be revenged. You will hear the evidence, gentlemen, and make up your verdict accordingly."

The Court inquiringly looked at Henderson, who arose and said:

"Your Honor, we do not know that we care to consume any time in making an opening statement, but should we conclude to do so, we will reserve our statement until the conclusion of the Commonwealth's evidence."

"Call a witness," ordered the Court.

"Call Mrs. Mary Thomas," said Haggard.

Mrs. Thomas was called. She appeared clad in



the deepest black, threw her veil aside, held up her right hand, was sworn and took the witness stand.

Her voice trembled perceptibly, but soon assumed its normal tone. Omitting preliminaries, she stated that she was the widow of the late Jackson Thomas; she and her husband and their six children had resided on a farm about eight miles out from Greenwood on the Russellville road. Hiram Dudley lived on an adjoining farm. Her husband was shot and killed at about eleven o'clock at night at his door on the 14th of the preceding August. She was at the house at the time.

"Now, Mrs. Thomas, I want you to tell the jury in your own way just what transpired that night," said Haggard.

"Well, we had supper as usual, and Jack—that's my husband—he went down into the lower field to turn the cattle into the pasture—you know we used one pasture in the day time and another at night. Well, the pasture we used to use had been plowed up and ——"

By Mr. Haggard, in a kind voice:

"Never mind, Mrs. Thomas, about those things. Just relate the things that occurred at the time of the assassination of your husband."

"Oh, excuse me," broke in Mrs. Thomas; "this is my first experience in court. I'll do my best, Mr. Haggard. Well, after my husband returned from the pasture we were sitting on the porch watching the moon rise and he said to me, 'Mary,'——"

"We object," thundered Brownlow and Henderson in a duet.

"Yes, don't tell anything your husband said to you on the porch," suggested Haggard. "Just tell what occurred at the time of the shooting."

"Well," said the witness wearily, "Jack and I sat there and talked until about nine o'clock, and then we went to bed. The two older children were staying all night with Henry Storms' children and the others were in bed. Our room is upstairs over the downstairs bedroom. We used to sleep downstairs, but Jack and I talked about it and he said ——"

"We object," came the duet again from the defendant's table.

"Just confine yourself, madam, to the occasion of the shooting," gently interposed Judge Lowden.

"Thank you, Judge, I'm trying my best to."

"Well, proceed," requested Haggard.

"What was the question you asked?" inquired the uninitiated witness.

"Just relate the facts about the shooting," said Haggard.

"Well, we went to bed and were, I suppose, asleep by half after nine. At ten minutes to eleven o'clock — I know, because I looked at the clock as soon as Jack struck a light — at ten minutes to eleven o'clock we were both awakened by loud hammering or knocking on the front door downstairs. We aroused at the same time. We both sat up in bed — that's an unusual thing in the country. The knocking continued. Jack got out of bed, pulled

on his trousers, struck a match, looked at the clock, lit a candle and said he would go down and see who it was. As he went out the door and got to the first landing on the steps the candle flickered and went out. He did not relight it — left it on the window-sill, for I found it there the next day. He went on downstairs and I went to my front window out of curiosity, to see what I could see. The moon was full, and it was as bright as day. I could not see anywhere near the front door, as the roof of the front porch cut off my view.

“I heard my husband unlatch the front door. He then said through the screen door, ‘Who is it?’ A voice answered, ‘A quick delivery letter, Mr. Thomas.’ I then heard him unlatch the screen door and heard it open — it always screeched on its hinges. Then I heard — Oh, I can’t tell it! I can hear it all in my ears now and —” Here the witness broke down and sobbed hysterically.

“Calm yourself, Mrs. Thomas, and do not hurry,” said the Court. “Mr. Sheriff, hand Mrs. Thomas some water.”

She drank the water, dried her eyes, and seemed stronger than before the break-down. She resumed:

“When the screen door opened I heard a terrible report — like both barrels of a shotgun fired at once. I was stunned and almost froze where I stood. An instant after the shot I saw out the window a man running rapidly across the yard, diagonally. He leaped the fence with one bound, mounted a horse standing there and rushed away.

He had something in his hand that I took to be a shotgun. At the same time that he jumped the fence I saw a white dog leap the fence and run off down the road,—south,—the direction the man had taken. All this I saw in a twinkling.”

“Now, did you hear any voices downstairs,” asked Haggard, “either just before, at the time of, or immediately following the report of the gun?”

“Yes, sir, I did. I distinctly heard some one say, ‘Nine hundred dollars.’ I did not recognize this voice. Then I heard my husband’s voice. He used Hiram Dudley’s name. Everybody calls Mr. Dudley ‘Hi’ for short. I heard Jack say, ‘You are Hi——’ He never finished the sentence. The gun fired at that instant.”

Henderson was objecting to all these statements, but the Court held they were a part of the *res gestae* and competent.

“Well,” inquired Haggard, oblivious to the objections, “did you hear anything further?”

“Yes, sir,” continued the witness. “As the man dashed away on his horse I rushed to my husband. As I went down the stairs I heard him use these words — ‘Woman — Leavenworth — extortion.’ I got to his side then. He never spoke again. The children were up and rushed out for the doctor. He groaned twice and died with his head in my lap.”

Here the witness again broke down. She again restored herself after a brief pause.

“How long have you known the defendant, Hi Dudley?” inquired Haggard.

"Ten or twelve years," answered the witness.

"By what name did your husband call him?"

"Always called him Hi," she replied; "that is, he used to when they were on speaking terms. They haven't spoken, though, for three or four years."

"Why was that?" interrogated counsel.

"They had a misunderstanding about some of Mr. Dudley's hogs getting in our corn. We took the hogs and held them until the damages and feed bill were paid. Mr. Dudley and Jack came near to blows in our lot one evening, and, with the help of Tom Ennis, I separated them. They haven't been on good terms since."

"You say you saw the man run across the yard, leap the fence, and ride away? Compared to the defendant's build, what size man was that?"

"He was just of such a build as Mr. Dudley."

"You say you saw a white dog leap the fence at the same time. State whether or not at that time Dudley owned a white setter dog?"

"Yes, sir, he did—that followed him everywhere."

"How did the size of that dog you say jumped the fence compare with the size of Dudley's dog?"

"Just about the same size."

"With reference to Dudley's house,—which way did the man go after he mounted?"

"He went in the direction of Mr. Dudley's house."

"Which direction did the dog go?"

"The same the man took."

"How long did your husband live after you reached him?"

"I should say from two to three minutes."

"Immediately after he died, did you make a light and examine the hall?"

"Yes, sir—as best I could in the condition I was in."

"If you discovered or found anything, state what it was?"

"I found this gun wad. That gun was a muzzle-loader. I found this paper wad in the burnt clothing of my husband, where the wound was inflicted."

"Unwrap that paper and read anything that may be on it?"

"It is badly singed and powder burnt. All I can decipher are the words in large black letters,—‘Farmer’s Gaze ——’"

"Is there a publication that circulates about here called *The Farmer’s Gazette*?"

"There is."

"Do you know, of your own personal knowledge, whether at the time of this murder Hiram Dudley was a subscriber to this journal?"

Henderson turned visibly pale at the question.

"I do not—of my own knowledge," replied the witness.

"Did you find anything else there?" pursued the relentless prosecutor.

"Yes, on the porch, just in front of the door, I found this."

Here the witness exhibited a white handkerchief

with a thin stain of blood, not more than a half inch in width, but extending entirely across the handkerchief.

"Do you, of your own knowledge, know whether the morning of the day this killing occurred the defendant Dudley had cut his right forefinger and had tied it up with his handkerchief?"

"I do not — of my own knowledge."

"Were you awake the remainder of that night after your husband was killed?"

"I was."

"The next day, did you see any tracks in the yard in the course taken by the murderer?"

"Yes, sir. The yard was in grass and the ground was hard except on that side of the yard. I had been preparing to replant some flowers in an old bed over there and there was soft earth running alongside the fence for about twenty feet. It was about fifteen feet wide. I saw four or five tracks there at daylight the next day."

"Did you the next day see any shoes fitted to those tracks?"

"Yes, sir, and they fit exactly."

"We object, your Honor," snapped Henderson. "They have not shown the absence of opportunity for forty people to make tracks in that yard between 10:50 P. M. and daylight."

"If the Court please, I propose to show that by other proof. I can introduce but one witness at a time," replied Haggard.

"On that idea, you may proceed," said Judge Lowden.

"Do you know whether those shoes were Hiram Dudley's?"

"The sheriff said ——"

"Never mind what anybody said, Mrs. Thomas," interrupted Henderson.

"I do not know myself," she added.

"Mrs. Thomas," continued Haggard, "did any physician reach your house that night?"

"Yes; Dr. Dayton got there an hour after my husband died. He examined him and picked a dozen shot out of what he called the surface wounds."

"Have you those shot and did you see the doctor get them out?"

"I did. Here they are."

And the witness opened a small paper package and held the shot in the palm of her hand.

"Do you know whether they are squirrel shot?"

"I'm not a hunter, but they are the size my boys always use in squirrel hunting."

"Do you know whether Hiram Dudley is a squirrel hunter?"

"Yes, sir. He is regarded as a wonderfully fine shot, and always makes the biggest bag squirrel hunting."

Haggard paused and reflected. The County Attorney whispered something in his ear. He resumed.

"Was this killing in this, Mecklenberg, county?"

"Yes, sir."

"Is this defendant here the Hiram Dudley you have been talking about?"



"Yes, sir."

Then followed a brief consultation with the County Attorney. Haggard stroked his chin meditatively, looked at the ceiling and said quietly:

"I believe you may take the witness, gentlemen."

## CHAPTER X

HENDERSON began the most difficult, dangerous, and delicate task ever allotted to a lawyer — the cross-examination of the heart-broken widow of the man your client is accused of slaying. Her evidence cannot be accepted as altogether true merely for delicacy's sake. Courtesy to the gentler sex and a general surrender to them in all departments of life is altogether chivalric and gallant, but when the man sitting behind you is staring at the gallows the woman in black is not a tear-stained, tender, gentle widow, but she becomes a *witness*, and *witness* only. But beware lest you excite sympathy for her should you press too hard. So, between that danger and the other absolute necessity, you have no alternative. The bright and glittering sword of Damocles hangs over your good, clear head, Defender Henderson. Others greater than you, so circumstanced, have snapped the thin barrier and gone to their professional death.

Tom Henderson's distinct characteristic in the cross-examination of a witness was brushing aside all redundant matter and plunging heels over head into the very gist of the evidence. He knew no preliminaries. Thus he began his task.

"You say you saw a dog jump the fence? Are you sure of this?"

"Yes, sir, I am."

"It was a moonlight night?"

"Yes, sir."

"At that time did not one of your boys own a white goat?"

"Yes, that is true."

"Did not this goat stay in the yard?"

"Yes, sir."

"At a little distance, would it not appear to be approximately the same size as Mr. Dudley's bird dog?"

"Yes, it would, I believe."

"Have you not seen it jump the yard fence often?"

"Yes, I have."

"Is it not true that the goat was fearfully afraid of the discharge of firearms?"

"I really do not know."

"At daylight, the morning after the killing, when you examined the human tracks, did you see whether the *other* tracks were made by a goat or by a dog?"

"No, sir, we did not."

"If I understand you, your husband just before the shot was fired said — 'Nine hundred dollars'; or some person said it, you didn't know who?"

"Yes, sir, that is true."

"That was not your husband's voice?"

"I do not know; my best opinion is it was not."

"Do you know Mr. Dudley's voice?"

"I do."

"Was it his voice?"

"I cannot say."

"Give your best opinion."

" I do not know."

" Give your opinion."

" I have no opinion."

" Did it sound like Dudley's voice? "

" I do not know."

" When you heard the voice, you never thought of Dudley, did you? "

" No, sir."

" Then there was nothing in the voice to remind you Dudley was there? "

" No, sir."

" You didn't then think it any voice you knew, did you? "

" No, sir."

" The voice you heard had nothing about it to remind you of Dudley, did it? "

" No, sir."

" Well, then, it did not sound like his voice, did it? "

" No, I don't guess it did."

" Well, now, after the nine hundred dollar expression uttered by a strange voice, you say you heard Mr. Thomas say, ' You are Hi ——,' and no more? "

" Exactly."

" Now, did your husband say this — ' You are h-i-g-h,' referring to the nine hundred dollars? "

" I don't know what he meant. I only know what he said."

" Isn't it just as consistent with what you heard to say that he said ' H-i-g-h ' as to say he said ' H-i ' ? "

"I suppose it is."

"After he was shot, you heard these words — 'Woman — Leavenworth — extortion' spoken by Mr. Thomas?"

"Yes, sir."

"Hadn't your husband lived in Leavenworth, Kansas, before he and you were married?"

"Yes, sir, for only a few months. Twenty years ago."

"Do you know whether on the day before the day he was killed a stranger called at your house to see your husband?"

"Yes, sir — a man came there to see Jack the day before."

"Is it not true that you and Mr. Thomas were seated on your front porch and this man rode up to the gate? And didn't Mr. Thomas, as soon as he saw the stranger, leave you and go to the yard gate and meet the visitor at the gate?"

"Yes, sir; but what has that to do with this case?"

"How long," persisted Henderson, "did the stranger remain in conversation with your husband at the gate?"

"How long? I should say about thirty or forty minutes."

"When your husband returned to you, did he offer any explanation as to who his visitor had been?"

"No, sir, he did not."

"Did you inquire?"

"No, sir. Just as soon as he got to the house

he said he had to hurry out to the tobacco patch to see after the hands."

"That is all, Mrs. Thomas," concluded Henderson abruptly.

"How far"—re-examined by Haggard—"is your front yard fence from the front of your house?"

"Really, I never measured it. I suppose, though, it's something like fifty to sixty yards."

"What kind of walk leads from the gate to the house?"

"Why, it's a gravel walk, with some rose bushes on each side of it."

"You may stand aside. Call Dr. Dayton, Mr. Sheriff," said Haggard.

## CHAPTER XI

DR. TOM DAYTON, perhaps more than six feet in height, broad shouldered, a goodly sprinkling of silver in his thin hair, took the stand. He wore sideburns, and his bright eye twinkled the twofold traits of candor and good humor. He took the oath with the air of a man familiar with the proceedings, as indeed he was. For forty years or more this fine old country doctor had baffled the snows of winter and the suns of summer over hill and vale throughout all sections of Mecklenberg County, comforting, cheering, healing. For this he was paid — sometimes.

Henderson knew that whatsoever the old doctor said to that jury would be accepted by them as absolutely true. Therefore the chief counsel for the defense had misgivings such as only those who have had a similar experience can appreciate.

"Thomas E. Dayton, practiced forty years, Mecklenberg County, Louisville School of Medicine," was his reply to counsel's first question.

Being requested to tell all he knew concerning the tragedy, he said:

"About 11:30 at night on the 14th of last August I got word to go to Mr. Thomas' quick. I reached there some time after midnight. Mr. Thomas was lying on his back in his front hall. He was dead, and had been dead, I should say, perhaps an hour. He had been shot in the stom-

ach — a mortal wound. I examined his body. I removed a number of shot from the epidermis; they were squirrel shot. The wound was sufficient to, and did, produce almost immediate death. I saw the gunwad and the handkerchief. Mrs. Thomas showed them to me. After I had removed the few shot I made an examination of the yard and found four or five tracks in the soft earth, which tracks led from the house to the fence in a diagonal course. I at once gave orders to keep everybody off that ground, and one of Thomas' boys stretched a wire around the tracks to keep people off. Mrs. Thomas, in an hour after I reached her, became hysterical and, being uneasy about her, I remained there the rest of the night. The news spread, and a short while after daylight many people called. The tracks were guarded and no one touched them. That day I saw some shoes fitted to them, and they fit precisely. I did not know whose shoes they were."

"Ask him," said Haggard to Henderson.

The defendant's attorneys whispered one to the other. Brownlow insisted on the witness being cross-examined. Henderson feared it. Reluctantly, however, he began the cross-examination.

"Is it not true, Doctor, that when you reached the house Mrs. Thomas was in such a state of mental distress as to be hardly responsible?"

"No, sir," firmly came from the witness; "on the contrary, she was wonderfully calm and self-possessed. Women are given to that in moments of great distress. An hour after I reached the



house, however, the reaction came and she was almost demented. At first, though, she was thoroughly at herself and related all the details of the tragedy with remarkable coolness."

"Stand aside," came from Henderson quickly, and he was seen to whisper into Brownlow's ear.

The next witness, Mack Burnley, took the witness chair. Mr. Burnley was a neighboring farmer, on pleasant terms with both families involved in this case. His reputation was that of an honest man, and his veracity had never been questioned.

He remembered the occasion of the killing. It was a brilliant moonlight night. His house was on the road between the Thomas house and the Dudley house. While the Dudley farm joined the Thomas farm, yet by the public road the houses were some two miles distant from each other.

"Tell the jury what you were doing that night, and what you saw or heard, and give the time as near as you can," instructed Haggard.

"I had been missing a lot of chickens lately, and at first thought foxes were doing the work. Later, I had reason to suspect otherwise, and I determined to watch and catch the thief. There is an old summerhouse in the corner of my yard, very near the public road, and after my henhouse burned my wife had this old summerhouse fixed up for a temporary henhouse. We were still using it. Between it and my front fence—about ten feet apart they are—is a low, thick cedar tree. At about nine o'clock I got my shotgun and went

out and hid myself under this tree to watch for the thief."

"How long did you stay there?"

"I guess until one or one-thirty in the night."

"Did you see the defendant that night; if so, state all about it?"

"I did. Somewhere about eleven o'clock — I didn't have a watch — I heard a horse approaching me rapidly; sounded like it was running very fast. Naturally, I kept very still and cocked my gun. Hiram Dudley was riding the horse, and he was going like the wind. He shot by me in a second. It was bright as day, and I recognized him and his horse; it was his sorrel three-year-old. I would have spoken or hallooed, but as he was passing I heard a twig break in the cedar thicket next to my yard and I thought possibly my thief was there, so kept still."

"Take the witness," said the prosecutor.

Henderson braced himself. Muttering inwardly the word "caution," he proceeded.

"You had no watch?"

"No, sir."

"How far is it from your summerhouse to Thomas' front gate?"

"About a mile — or three-quarters, possibly."

"At that time was there an old traction engine on the side of the road between your place and Thomas' front gate?"

"Yes, there was."

"How far was it from your place?"

"I guess about a quarter."

"When Dudley passed you what was his manner? Did he say anything?"

"I did not hear him say a word. He was rocking in his saddle, peculiar-like; rather reared back."

Now the next question in Henderson's mind, even though yet unexpressed in words, made a cold chill pass up and down his spine. He feared to ask it, yet he felt it must be asked. Here's what he whispered to Brownlow: "If he saw it you can rest assured Haggard would have asked him. The fact that Haggard *failed* to ask about it, proves that he could not prove it by him. I am willing to take the chance — what do you say?"

"It's gambling," whispered Brownlow, "but all the odds are our way."

"Now," said Henderson to the witness with rare nonchalance, living an age the while, "it was a brilliant night and you had no difficulty in recognizing Dudley and his horse?"

"None whatever."

Henderson paused. He whispered to Brownlow: "Let's wait. We can recall him later. I'm afraid of it." Then to Burnley: "Stand aside."

"Just a moment," said Haggard,

"Was Dudley coming from the direction of Thomas' house?"

"Yes, sir."

"Was he going toward his own?"

"Yes, sir."

"Judge," said Henderson, "perhaps the jury would prefer hearing the witness testify than Mr. Haggard. The questions are very leading."

"Yes; don't lead the witness, Mr. Haggard," directed the Court.

"Call John Dudley," was Haggard's only answer.

John Dudley was the eight-year-old son of the defendant. The Judge leaned forward intently. Henderson had been prepared for this, and was not the least abashed. His knowledge of what was to follow perhaps helped in the matter of those sleepless nights hereinbefore referred to. But at least there was lacking the element of surprise — a condition altogether consoling in such situations.

"Come around, John," — it was Henderson's cheery voice, — "my little man, and talk to Mr. Haggard awhile."

Haggard said he did not care to have him sworn, and that was dispensed with. Henderson wrote on his memorandum of the trial these words, "Jno. D. testified *against* us. Not sworn. Error."

"My boy," kindly began Haggard, "how old are you?"

"Eight."

"Whose boy are you?"

"Mrs. Dudley's; used to be papa's and mama's both, but papa's been gone so long I'm just mama's now."

"Do you remember when they came and took your papa away?"

"Yes, sir. Mama tells Will and me about it every night when we say our prayers."

Haggard was beginning to feel ill at ease. This manly little fellow had already dimmed the eye of

every juror in the box. It was too late to retrace his steps now. He somehow felt like a drowning man. He must needs swim on and on until he reached the shore; stop in midstream he could not.

"Did your father have a shotgun?"

"Yes, sir, a dandy," brightened the little fellow. "He used to take me out huntin', and we had lots of fun. The last time we went out—that was just before they took him away—I saw an old squirrel settin' on a limb in a tree across the fence, and I said 'Hit him, Dad'; but he wouldn't do it. He said Mr. Todd didn't like for nobody to kill his squirrels, and it was Mr. Todd's land."

"Do you remember when you went to bed the night before they took your father away?"

"Yes, sir."

"Did your father keep his gun in that room?"

"Yes, sir."

"Did he keep it on the wall in a sort of a rack?"

"There was two nails drove in the wall,—big nails,—and he kept it hangin' on those nails."

"Before you went to sleep did you see your father with the gun?"

"Yes, sir, while I was in bed papa took the gun down from the wall and was gettin' ready to load it, but I went to sleep right then."

"When you got up next morning where was the gun?"

"It was on the wall where it stays."

"You may ask him," concluded Haggard.

"We move to exclude all this witness' testimony from the jury," he continued.

"What's the point?" inquired the Court.

"All incompetent," was the blanket response made by Henderson.

"Overruled," said the Court. "Call another."

Henderson wrote in his memorandum: "Boy not cross-examined; no waiver of failure to swear him. Motion to exclude overruled."

Tip Allen, deputy sheriff, was next called. He had executed the warrant of arrest on August 15. He went to Dudley's house with the warrant, about noon. Told Mr. Dudley his business.

"What, if anything, did Dudley do or say?" asked Haggard.

"He said very little. He thought for some time and said: 'I'm ready to go with you.' I asked him if he would object to allowing me to examine his shotgun. He said 'Certainly not, examine it'; and I did so, carefully."

"What kind of gun was it?"

"Double-barrel muzzle-loader."

"With reference to its having been fired, give its appearance?"

"The gun was empty. It looked to me like it had been fired recently. It smelled of freshly burned powder and there were two exploded caps under the hammers."

"Is this the gun?" exhibiting a gun.

"Yes, sir, that is it."

"Now, did you say anything to Dudley about his shoes or the tracks?"

"Yes, I did. I told him there were some tracks in the yard, and asked him if he would object to lending me a pair of his shoes to fit in the tracks. He said he would be glad to let me have them, and gave me a pair."

"What did you do with them?"

"I left Mr. Dudley with the constable and went and tried the shoes in the tracks."

"What result?"

"Well, they fit the tracks."

"Now, before you left Dudley's house did you notice any wound on his finger? If so, tell about that."

"Just before we left — after I brought the shoes back — Mrs. Dudley got a piece of cloth and some turpentine and tied up his right forefinger. He had a cut place on it."

"Did he say anything about his finger?"

"He just remarked that he cut it to the bone the day before."

"Give the names of those who saw the shoes fitted in the tracks."

The witness named a dozen or more persons.

"That's all," said Haggard.

"Stand aside," quickly said Henderson.

Henry Reno was the next witness. He was editor, owner, publisher, typesetter, newsboy, and janitor of the *Greenwood Record*, a weekly newspaper published at Greenwood. Reno had a pencil behind one ear, a pen behind the other, and newspapers protruding from every pocket. Who and what he was was soon shown.

"As publisher of the *Record*, do you club with other periodicals,—that is, do you sell your paper and include other journals?" asked Haggard.

"Yes, sir; we have all the metropolitan dailies and others on our clubbing list."

"In your clubbing list is there such a periodical as *The Farmer's Gazette*?"

"Yes, sir."

"Do you know the defendant, Hiram Dudley?"

"Quite well."

"Was he, on and prior to last August 14, a subscriber to *The Farmer's Gazette*?"

"Yes, sir, he was."

"How do you know?"

"He subscribed for the *Record* for one year June 17 last, and along with the *Record* he also took the weekly *Courier Journal* and *The Farmer's Gazette*. He told me afterward, in a joking way, that the fellow who edited the *Gazette* was an agriculturist and not a farmer."

"That is all," by Haggard.

"How many other subscribers to the *Gazette* were there in Mecklenberg County at that time?" cross-examined Henderson.

"My books show sixteen."

"Read the list, please?"

The witness here read sixteen names, all of whom are strangers to the reader with one exception—James Hanna, Esq. Reno then stood aside.

"May it please the Court," said Henderson, "when Mr. Burnley was on the stand we neglected to ask him a question. We want him recalled."



Burnley again took the stand. Henderson, inwardly a fit patient for a nerve expert, outwardly as calm as any disinterested onlooker, proceeded to the dangerous question he and Brownlow had deferred till now.

"When you were waiting for chicken thieves," began Henderson, "on the night of the tragedy, you say you are sure it was Dudley who rode by you?"

"Yes, I am positive."

"Wasn't it too dark for you to surely recognize him?"

"No, sir; I could tell almost as plain as I now recognize you."

"But you could only see a dim form on horseback — a mere outline?"

"No. I could see everything, his hat, his face, his arms, and I could see both his hands on the bridle. It was plain as day. I wasn't eight feet from him as he passed."

"Then you could see his arms and hands — both hands — holding the bridle?"

"Yes, that is true."

"Then," triumphantly pressed Henderson, "he had nothing in his hand other than the bridle?"

"He did not."

"Are you sure?"

"Absolutely sure."

"He did not have a shotgun, then?"

"I never saw it."

"You saw both hands,— his saddle, his shoulders and all,— and you swear he had no shotgun?"

"I do. He could not have had a shotgun without me seeing it."

"Stand aside; that is all," and Dudley's lawyer's heart beat quiet.

"Gentlemen," said Judge Lowden, "it's growing late and we'll adjourn here. Mr. Sheriff, what deputy will you have to take charge of this jury for the night?"

"Mr. Allen, your Honor," replied that kind but thoughtless functionary. Henderson was on his feet and at the Judge's bench in an instant.

"Don't worry, Tom," said the Court privately to Henderson, before he could speak. Then quietly addressing the sheriff, Judge Lowden reminded him that Allen was a witness in the case and it would be improper to place the jury in his custody. Deputy Howard was then chosen, and sworn to keep the jury together, suffering no person to speak to any of them, "and that you will not do so yourself, concerning any matter relating to this case," etc., etc.

"Now, gentlemen," continued the Court, addressing the jury, "you are to be kept together as the law requires in this sort of case. I want to caution you. This is a very critical period in this trial—you can't be too prudent and too careful. I don't want any man to find out how any jurymen views this case. If you are in any way approached, remember it is an insult to you and contempt of this court. I don't apprehend any such thing, but should it occur, you report it to the Court and I will see that it is never repeated. I want

you to try this case like twelve, disinterested gentlemen ought to try a case. Don't discuss it in any way. Don't make up your minds until you have heard it all in the orderly, sober, quiet way provided by law. Go now, gentlemen, until nine o'clock to-morrow morning. Everybody remain seated until the jury passes out. Mr. Sheriff, adjourn court."

And as the building was emptying itself, its old rafters echoed, as it had done for many a year, with the now almost extinct:

"Oyez! oyez! the honorable Mecklenberg Circuit Court now stands adjourned until nine o'clock to-morrow morning."

## CHAPTER XII

PROMPTLY at the appointed hour the following day hostilities were resumed. Haggard called and examined a half dozen witnesses, who made statements similar to those of Mrs. Thomas and Tip Allen regarding the tracks and the shoes.

He then called Bud Jones, who testified to hearing Dudley, three weeks before the killing, say that he would kill Jack Thomas if he ever annoyed him any more. He was not cross-examined.

In the vulgar jargon of the profession Haggard was reserving his "big gun" for the last. Henderson was aware of this habit of his antagonist. He thought he knew what the particular "big gun" was, but despite this knowledge he could not overcome a certain grave misgiving, when he looked at the impenetrable Haggard, with his granite-like expression.

Haggard had about "filled in" all the gaps in the evidence, a proceeding so dull and uninteresting to the public and of so vital importance to the making of a well-rounded, perfect, complete case. This "filling in" process is carried out by calling this witness and that witness to prove small and comparatively insignificant facts. Such minor details, taken separately, amount to nothing; marshaled collectively by a skillful and adroit advocate the public then realizes their immense value and importance.

Having thus "touched up" his case, the Commonwealth's Attorney concluded to fire his "big gun," then close and watch the enemy defend himself.

"Call Miss Mary Holland," said he.

Now, Miss Holland was a cousin to Mrs. Dudley and resided with the Dudleys. She had lived with them for several years, and was a member of that household at the time this tragedy occurred. When her name was called Henderson, though he knew her testimony was extremely dangerous to him, sighed a sigh of relief. Better, anything, than springing a surprise at this stage of the trial. He knew that this was Haggard's final thrust and, though a broadside, it were better than a sudden, unexpected stab in the dark. He despised woman's tongue in general, when he reflected that Haggard would never have had this witness from under Dudley's own roof but for her innocent indiscretion in talking promiscuously on the day of Dudley's arrest. It seemed the very irony of fate that this woman, who loved the earth under the defendant's feet, should be almost the chief reliance of the prosecution against him. When she finally saw and grasped her position, she had wept bitterly on Mrs. Dudley's shoulder, then raged and stamped her foot, and finally, with commendable heroism but doubtful integrity, offered to merrily perjure her soul and deny it all. Hiram Dudley had thought it over. One day he sent for her to come to the jail.

"Mary," said he, "this is bad enough; don't

make it worse. You must tell the exact truth on the witness stand. There are two reasons: First, it is the truth; second, they could prove you lied if you denied it."

"You reside with the Dudleys, I believe?" began Haggard.

"Yes, sir, I do."

"Were you living there last August?"

"I was."

"Were you at home — there — the night Mr. Thomas was killed?"

"I was."

"Where were you that night, after ten o'clock?"

"I was in my room at Mr. Dudley's."

"Does your room join his room?"

"Yes, it does."

"Did you see or hear him that night after ten o'clock?"

"Yes, sir."

"Tell how that happened, what you saw, the time, etc."

"Well, my room joins Hiram's. It was a very hot night, and we had all the windows and doors open. Mrs. Dudley and I talked until about nine o'clock, and then retired. She went to her room, where the two children were asleep, and I remained in my room. Mr. Dudley was then sitting in his wife's room — where the children were — reading. I left my room door open and went to bed, extinguishing the light in my room. I immediately went fast asleep. Some time later, I don't know whether eleven or twelve o'clock, I was awakened

by Mr. Dudley's voice in the side yard, saying, 'Wooh, Dick!' — Dick is the young horse on the place. He kept this up awhile, and finally I heard the stable door shut and Hiram entered the house, coming around and entering the front door. I paid no particular attention to it, as he had been going down to Mr. Jason's, sitting up at night with Mr. Jason, who was then quite sick. He came into the hall and walked into his wife's room, she in the meantime speaking to him. She struck a light presently and, lying in my bed, I could see him. It was then he walked to the nails on the wall and hung up the shotgun he had in his hands."

"The first you saw was Dudley putting the shotgun on the nails in the wall?"

"Yes, sir."

"And that was between eleven and twelve o'clock?"

"I should say about that time."

"Was Dudley in the habit of coming in with his shotgun at that hour of the night?"

"No, sir."

"Did you ever know it to happen before?"

"No, sir."

"You may ask her," said Haggard.

"Stand aside for the present," directed Henderson.

"The Commonwealth will rest here, your Honor," announced Haggard.

Henderson, Brownlow, and Dudley conferred briefly. Henderson then arose to make the opening statement for the defense. This is all he said:

"Your Honor, please, and you gentlemen of the jury, I am constrained to feel that you, as the triers of this case, had rather hear this defendant's testimony directly from his witnesses than from his retained attorney. Perhaps, in a feverish, long-cherished hope of seeing the defendant once more breathe the free air of heaven, I should be made the partisan defender of his innocence, rather than the true and accurate narrator of the facts. Therefore, knowing my utter incapacity to relate the story of each of his witnesses without discoloration, I shall forego that task, leaving them to tell it all to you from this witness stand. As I grow in years and experience in this grave business of trying men for their lives and liberties, I begin to realize the utter futility of attempting to undervalue the evidence offered by the other side. I confess my friend, the learned Commonwealth's Attorney, has presented a wonderful chain of circumstances. But, my friends, if fate has been unkind to this young husband and father in arraying all these bits of evidence against him, fortune has fully compensated by making possible of proof another array of indisputable facts, which at once pronounce his innocence. But for this latter series of circumstances, I shudder at what might have been the consequences here. Circumstantial evidence, at best a cruel, relentless engine of oppression, henceforth to me shall be always disregarded and looked upon as a monster viper, attempting to coil about the very vitals of some unfortunate man who *happens* not to have a witness to the real fact. There



are pages of history that run red with instances where innocent men have been condemned to death on circumstantial evidence, and after their bones had rotted in avoided and despised sepulchers the fearful and terrible mistake discovered. And, gentlemen, there are other pages of other history where enlightened jurymen have refused to administer justice of the type of the Dark Ages, and have stood firm and resolute, demanding something more than suspicion before condemning a fellow-man to death. It may be — I do not know — that some of you have had personal experience with this thing — circumstantial evidence. I trust such is the case, for then perhaps you will the more patiently lend an ear to this young man. You have heard it said, doubtless, that so long as all the links are there, a chain of circumstantial evidence is stronger than any direct evidence; that witnesses to the fact may lie, may err, may not remember; but that circumstances cannot lie, or err, or forget. I take issue here. In direct evidence, it is quite true, the witness may lie; but if not lying, no doubt exists. In circumstantial evidence you have not only the likelihood of the witness to the circumstance lying, but, in addition, the circumstance itself may lie. In direct evidence you have the one lie to guard against, while in circumstantial evidence you have to deal with two possible lies — the relator of the circumstance and the circumstance itself. And when you shall have heard this defendant's evidence you will understand what I mean by circumstances lying. For example, the footprints told a

terrible lie; the handkerchief bandage duplicated the perjury; the gunwad, a circumstance, told the most terrible lie of them all. Had that tissue of falsehoods been told by direct evidence, we could have cross-examined the witnesses; but we cannot cross-examine an inanimate gunwad, a handkerchief, a footprint. We can account for them, *provided*,—and that's an awful word at this juncture—provided, we *chance* to have a witness in addition to the defendant. I flatter myself that I know you twelve men. I know you will not take from this little woman and these glorious handsome boys this husband and father unless you know—not merely suspect—that he is a murderer. I shall trust you to follow the evidence, step by step, or, to gratify the ear of the learned prosecutor, link by link.”

“Mr. Dudley, be sworn,” said the speaker, as he resumed his seat.

## CHAPTER XIII

THE defendant, being sworn, took the witness stand without the slightest emotion or trepidation.

"Your name?" began Henderson.

"Hiram Dudley."

"Your age and place of residence?"

"Thirty-four years of age. I live out here on a little farm — the old Warren place — about eight miles from town."

"Are you married?"

"Yes, sir."

"Whom did you marry?"

"I married Ella Jameson."

"When?"

"Eleven years ago."

"Have you any children?"

"We have two boys there, John and Will."

"How old are they?"

"John is eight and Will is six."

For the laymen's information, should a layman do us the honor to attempt these pages, it is here said that Henderson was asking these simple questions chiefly to afford the witness ample opportunity to become accustomed to the witness stand.

"How long have you lived on this farm?"

"About twelve years."

"With relation to the Thomas farm, where is your farm?"

"My land joins the Thomas land; but by the

public road it is about two miles from my gate to his."

"Where is the Burnley place?"

"It is between my gate and the Thomas place — about half way."

Henderson had spent many hours over just what method he would employ in examining the defendant. He had the saving sense to realize that his client's life or liberty depended to a very large degree upon the impression he made upon his hearers. It was his opinion that Haggard expected Dudley to flatly deny many of the condemning circumstances. This was far from the defendant's intention, and still further removed from his attorneys' plans. It would have gratified Haggard immeasurably had the defendant boldly controverted all these proved facts. Unfortunate is the witness who denies a fact clearly proved against him. Wise is the witness who admits all proved facts and, in lieu of denial, substitutes explanation. So, after much serious consideration and consultation with Brownlow, Henderson had determined to proceed with the examination, rather reversing the usual order. He could not resist noticing the effect on Haggard as he proceeded.

"Did you pass Mr. Burnley's gate between eleven and twelve o'clock on the night of this murder, riding horseback?"

"I did."

"When you reached your home, did you, when you had entered your room, hang your shotgun on the rack on the wall?"

"I did."

"On the day before the killing had you cut your finger?"

"I had."

"On the day of the killing, did you have your finger bandaged?"

"Yes, sir, I did."

"Had you at that time a white setter bird dog that usually followed you?"

"Yes, sir. There he lies under that table now."

"When the deputy sheriff examined your shotgun on the day following the killing, was it loaded or unloaded?"

"The gun was then empty."

"Is it true that it then smelled of burnt powder and had it been recently fired?"

"That is true. It had been fired the evening before."

All this staggered Haggard. Every time the defendant admitted the truth of one of the State's facts the profound prosecutor felt that another argument had been swept away. He turned to the County Attorney and muttered:

"Looks like he's going to wind up by pleading guilty."

But the State's counsel, nevertheless, was sorely disappointed at the enemy's method of fighting. He would so much more have preferred to stand his clearly proved facts alongside the defendant's unsupported and *interested* denial.

"Were you, at the time of the killing, a regular subscriber to *The Farmer's Gazette*?"

"I was, and am still."

"You recall, your little boy John testified that after supper on the evening of the tragedy, just before he fell off to sleep, you took your gun, got the loading material and prepared to load the gun — then he went to sleep? Is that true?"

"Yes, that is true."

Haggard, externally still placid, shook himself as men sometimes do, thinking perhaps they are dreaming and the thing is not real after all. Here was a defendant calmly admitting every fact proved by the Commonwealth. Would he never deny at least one?

"Ah, Henderson," he reflected, "I have you on this mass of undeniable evidence. You realize it and propose to admit all my facts and deny my conclusions."

"Were you," resumed Henderson, who thought he read some of Haggard's reflections, "were you at and before the time of this killing on friendly or unfriendly terms with Jackson Thomas?"

"We were on unfriendly terms. We did not speak and had not spoken for several years."

"Do you know the witness Bud Jones?"

"I do."

"Did you at Kedron Church, about three weeks before the killing, have any talk with Jones relating to Mr. Thomas?"

"Mr. Jones did most of the talking — yes, such a conversation took place."

"Did you say in the presence of Bud Jones, at the time and place indicated, or say in substance,

that you proposed to kill Jackson Thomas if he should annoy you again?"

"Yes, substantially that. I want to say, though, that Mr. Jones only told a part of that talk. What he said was true, but he did not tell that he said to me ——"

"We object, your Honor," said Haggard, glad to relieve his pent-up feeling.

"Now, your Honor," said Henderson, "Jones singled out an extract, a fraction of an entire conversation. Isolated, it has an entirely different purport and meaning than it has as a part of the entire conversation. We insist that all the conversation — that is, all of it relating to this subject, — is competent."

"You may detail all of the conversation," ruled the Court, "relating to Mr. Thomas. You must draw the line there."

"Now," resumed Henderson, "tell the jury all that was said in connection with Jackson Thomas in that conversation."

"Well, Jones began the talk. He asked me if people in the country where I came from submitted to a man slandering the women folks. I asked him what he meant. He replied that Mr. Thomas had said to him that my wife's virtue and my character were about on a par. I did not believe Thomas had said such a thing, and so told Jones. He insisted he had. We argued it. I said to him, 'Bud Jones, Thomas never said such a thing for two reasons. First, he has no cause to do so; second, he ought to know that if he ever began that

sort of annoyance I would kill him on sight! That is about what I said. Jones still argued. I saw he was a busybody interested in getting up trouble, and I left him."

"Are you in the habit of hunting squirrels?"

"Yes, very often."

"Did you usually keep your gun loaded with squirrel shot?"

"Nearly always."

"Was your gun a muzzle-loader?"

"It was."

"Did you frequently make the wads out of newspapers that were lying about your house?"

"Yes, nearly always."

"On the night of the killing was Mary Holland staying at your house?"

"She was."

"When you came in did your wife make a light?"

"Yes, sir, she did."

"Do you recall whether the door leading from your room to Miss Holland's room was open or closed?"

"I do not recollect, for sure, but my best judgment is the door was open."

"Did you kill Jackson Thomas?"

"I did not, as God reigns and as I love that woman and these two boys."

"Were you in his yard or anywhere near his door on that night?"

"I was not."

"Now, Mr. Dudley, I want you to begin at the



beginning and tell this jury all about your movements on that night?"

Twelve men were leaning intently forward. Judge Lowden had long since discarded his newspaper and Haggard fastened his piercing eye on the witness as if to fathom all his depths. He had studied men, and had read many liars by countenance. Here was a simple farmer putting at sea all his erstwhile successful methods. The witness was neither bold nor backward. He was quiet, yet intense; mild yet firm. Had he been otherwise this prosecutor of long experience would not have held that *per se* against him. He had long since learned that when life or liberty is at stake, when rustics unaccustomed to public appearance, when timid women are put under the gaze of crowds of strange faces, when men easily embarrassed testify, all of these, he knew, stammered and colored and contradicted themselves, and thereby not infrequently were put down as liars by those inexperienced in the study of witnesses. Every lawyer has seen the most scrupulous witness become so embarrassed by public appearance that he made the wildest, most absurd statements. When jurymen learn to distinguish between embarrassment and dishonesty perhaps justice will less often miscarry.

None of these suggestions are germane to Dudley. Quietly, he thus told his story.

"I will tell it the best I can. I usually feed the stock about dark every evening. On the evening of Mr. Thomas' death I was at my stock barn a little earlier than usual. I led two mules down to

the pond for water, and as I did so a lot of doves flew up from the pond. As you know, dove shooting about here is good. I took the mules back to the barn, went to the house and got my gun. When I reached the pond a lot of them were on the edge of the water, drinking. I fired the right barrel and killed three at one shot. When the others flew up I tried them on the wing, but missed. I took the three doves to the house. It was too late to cook them for supper, and the folks had them next day. That's how it happened my gun was empty and showed that it had been freshly fired. I took the gun in my room, intending to clean and reload it after supper.

"After supper we — my wife and I — put the boys to bed. William, the little fellow, at once went to sleep. John remained awake for some little time. He has always been interested in guns, and would not go to sleep until I agreed with him to clean and load the gun. To humor the boy, I got the gun, loading material, rags, etc., and pretended to begin loading it. The boy, already very sleepy, dropped off to sleep just as I had begun. I put the gun on the floor by the table, laying it down flat and picked up a paper and began to read. My wife went into Mary Holland's room and they talked in there until about nine-thirty o'clock and Mary put out her light and went to bed. Wife and I talked until about ten o'clock, I should say, and she concluded to go to bed.

"Mr. Jason, who lived down the road north of me about a quarter of a mile beyond Mr. Thomas,

had been very sick. The neighbors had been sitting up with him at night, and this night it was my time. I was to be there at about eleven o'clock. My wife knew this and went to bed.

"I went to the barn and saddled a young three-year-old I had been using, trying to break him. I mounted him and left my premises. As I went by Mr. Burnley's house I saw him open his front door and walk out on to the porch. My horse was spirited and was prancing in the sandy road there in front of Mr. Burnley's gate. I got by, though, in a minute and I don't think Mr. Burnley saw me at that time. I rode on down the road in the moonlight, and before I got to the Thomas place I passed an old traction engine on the roadside. My young horse frightened at this, but I soon quieted him and after that, a short distance, I passed Mr. Thomas' house. It was all dark and quiet. I continued on past the Thomas place until I came to the Grayson place. Mr. Grayson was just entering his gate, leading a horse and buggy. We spoke, and I inquired about Mr. Jason. He said he was about the same, but that he was too sick to be alone at night, and that Jackson Thomas was to sit up with him that night ——"

"We object to the conversation with Mr. Grayson," interrupted Haggard.

"No, don't tell the conversation you had with Grayson. What information did you obtain from Grayson?" asked Henderson.

"That Mr. Thomas was to sit up with Jason that night. He had just come from there and

Thomas was expected when he left. Mr. Grayson died a month after that, but Mr. and Mrs. Jason are here.

"Well," continued Dudley, "I knew it would not do for Mr. Thomas and me to be there at the same time. Only one man was needed, and Thomas and I did not speak. I then concluded to go on back home. I was walking the young horse, and I passed Mr. Thomas' house on my way back and walked the horse down the road. I came upon the old traction engine unexpectedly. My horse gave a tremendous jump, shied, and then lunged forward, beginning to run away. At that instant I heard the report of a gun—one shot—in the distance behind me. The colt got the best of me and ran like the wind. I had both hands on the bridle and was pulling back as hard as I could and sawing his mouth all the time. This is what I was doing when I passed Mr. Burnley's house then. As the colt recognized his home gate he stopped. I went into the side yard with him and had trouble getting him into the barn. The noise I there made is what awakened Mary Holland.

"I then went around the house and unlocked the front door and went into the hall and then into our room. My wife did not expect me home until morning, and was a little frightened. She spoke to me in the dark, and I answered. I had no match with me, but the lamp and matches were at the head of her bed, and she lit the lamp. While she was lighting it my feet struck something on the floor, near the table, and then I remembered

I had forgotten to load the gun. Just as my wife was putting the match to the lamp, I picked up the gun, and then the light shone brightly. I walked across the room and hung the gun on the wall.

“In a few minutes I explained to my wife why I came home so unexpectedly, undressed, went to bed and was soon asleep. The next day I heard of Mr. Thomas’ killing, and that I was suspected. I did nothing, and could do nothing. At about noon I was arrested and taken to town and put in jail, where I have been since.”

## CHAPTER XIV

HENDERSON, himself a firm believer in his client's absolute innocence, agreed with himself, so to speak, that he could present a strong case of not guilty.

The question of *who killed Thomas*, presuming Dudley did not, was quite another matter. Was it incumbent on him to fasten the crime on the guilty man, or merely to establish the fact that his client did *not* do it? On the question of Dudley's guilt Henderson was quite satisfied that respectable and strong evidence was at hand; as to who was the real assassin the proof became hazy and largely speculative. Weighing this in all its phases, he had finally resolved to bend every effort in marshaling the facts conducing to show, first, that Dudley did not fire the fatal shot; second, that a certain other individual did fire it. It would be superfluous to add that he had far more faith in his ability to demonstrate the truth of proposition No. 1 than that of proposition No. 2.

The examination was resumed.

"Did you have any motive or reason to kill Jackson Thomas?"

"None whatever."

"Did you have or ever have any transaction of any nature with him involving nine hundred dollars?"

"None whatever."

"Did you ever have any transaction of any kind with him involving any money in any amount?"

"None, except the trouble we had about the hogs — absolutely none."

"Did you ever have any transaction of any kind with him, in which the city of Leavenworth was involved?"

"None whatever."

"Were you ever in Leavenworth?"

"Never."

"Do you know or did you ever know any person by the name of Leavenworth?"

"Never in my life."

"Did you ever have any transaction or relation with Mr. Thomas in which any woman was involved?"

"Never in my life."

"Have you any idea of the meaning or significance of the words 'woman, Leavenworth, extortion,' spoken of by Mrs. Thomas?"

"None whatever."

"You said you had badly cut your finger the day before the killing. Now on the night of the killing was your finger bandaged with a white handkerchief?"

"No, sir. I cut my finger the day before with a hand ax. My wife bandaged it that day. The next day, in the afternoon, I was in my wife's room and she, Mary Holland and Mrs. James, a neighbor, were in the room. My wife noticed the bandage was gone and my finger swollen. Of course she wanted to tie it up again. She and Mary Holland were doing some knitting or some such work. My wife held some yarn or something

wrapped around her two hands and Mary was rolling the stuff into a large ball. Both of them being busy, Mrs. James offered to bandage the finger. She got a piece of colored calico or goods of some kind, and wrapped my finger with it. I had this colored stuff on my finger when I rode by Mr. Thomas' house that night. It remained on my finger all that night and until a short while before I was arrested the next day."

"On the night of the killing, when you started to Mr. Jason's, did your white setter dog follow you?"

"No, sir. He never followed me at night."

"Was the dog with you when you met Mr. Grayson and received the information about Thomas sitting up with Jason?"

"No, sir."

"Was the dog with you when you rode by Burnley's in a run, going home?"

"No, sir; the dog was at home asleep on the floor in the hall."

"That is all for the present. Ask him, Mr. Haggard," concluded Henderson.

Haggard doubted the wisdom of a cross-examination. Henderson saw his hesitation, and rejoiced that these misgivings had now taken up their abode at the other table.

"If you cross-examine him," whispered Automaton, alias the County Attorney, "he will only make it stronger." Haggard looked his associate over, poorly concealing a bored expression.

"That's nothing to me. I'm trying to find out



whether this man is guilty. I believe he is,—as guilty as hell,—but I do not propose to dodge the fullest inquiry in this or any other case I prosecute.”

Now, in this merry old world there are all sorts and conditions of attorneys for the Crown. There is the bitter, fox-visaged skeptic, to whom all accused are *prima facie* guilty. Class No. 2 embraces the spineless lot, in whom the original milk of human kindness has turned to clabber, with whom all accused are innocent. Thanks to the divine scheme of men's creation, Class No. 3 splits evenly the obnoxious extremes, and, behold! a fearless, unrelenting, uncompromising prosecutor of crime and defender of innocence. In short, an inquirer of the truth.

Haggard turned on Dudley. The cross-examination was fierce, tireless, merciless. The rapid fire of questions continued and continued. Once, during the heat of the battle, Henderson scented danger. His eagle's eye saw breakers ahead. The witness, however cool and self-assured, was no match for this master of his science. Like the fagging prize-fighter, Dudley only needed a respite for a breath or two. Henderson objected to the line of interrogation. He argued his objection at length. The Court ruled against him. He repeated his argument, as if hoping to induce the Court to reverse himself. He won, not the point, but *time*. Lowden saw and understood it all. In his just judge's heart he could find no censure for Henderson. He was judge now, but long ago he

was down there on the floor struggling against just some such onslaught. He ruled on the second argument. If he was more deliberate than usual, charge it to his superb sense of fair play.

"Proceed, Mr. Haggard," concluded the Court. Dudley had had his "breathing spell." His physical and mental self had become normal again. Having reflected full ten minutes on the last question, during the argument, he said quietly and with dangerous humility,

"What was your last question, Mr. Haggard?"

Haggard was fretted by the interruption. He knew the plan of Henderson in consuming this time. It angered him to know that it had been highly successful. Yet he had been powerless to prevent it. He resumed the fierce attack. Spurred on by Henderson's successful coup, he grew the more relentless. He spared the witness nothing. This second assault, as is often the case in actual battle, was more terrible than the first. Thrust after thrust, charge after charge, grape, canister, shrapnel, followed relentlessly the one upon the other. At first the witness returned blow for blow; then he parried, then the inevitable result of practiced skill matched with inexperience, a look to the rear, an anxiousness to hurry into full retreat. Dudley was visibly weakening. Already this appeared to the practiced eye of his attorney. It was not a question of lying or speaking the truth. The thing was resolved into an intellectual duel, between a giant and a pigmy. Haggard saw he had punctured the enemy's armor. Henderson saw it.

Lowden saw it. The twelve "good men and true" had not yet discovered it. Soon it would appear to them. Haggard pressed his advantage. He looked the witness out of countenance and was gradually and mercilessly drawing his net about him. To Henderson the supreme moment of that trial had come. The "objecting ruse" could not be duplicated without the jury seeing that he was "on the run." Just as Haggard was preparing to crush the now hapless defendant, Henderson gave an almost imperceptible nod to Jim Hanna, who was standing in the doorway. Whereupon, Hanna, with his eternal *sang froid*, indifferently walked to Henderson's table and handed him a note. Hanna's nonchalance was equaled, if not surpassed, by Henderson's surprise. He read the note and said apologetically:

"Your Honor will pardon me, but I'm called to the long distance telephone on a matter of importance."

"Certainly, suspend a few minutes, Mr. Haggard," said the Court, "until Mr. Henderson returns."

"All right, your Honor," said Haggard, and then under his breath, "Damn that fellow!"

Henderson was off — to the telephone, and Dudley leaned back in his chair, thanking God he had a lawyer.

Now, O you ethical reader, judge not, lest ye be judged. This only shall be said to you here. This lawyer, to the bottom of his heart and the depths of his soul, believed his client was speak-

ing the absolute truth. He saw that client, for whose life and liberty he was responsible, thrust into the midst of a terribly uneven combat. It was not a contest of truth over anything. It was a battle in which truth was a mighty weapon, but, alas! not the only one. It may have been a veritable broadsword, but loquacity, intellectuality, skill, persistency, coolness, these were the sharp rapiers and lances. So, be it here confessed, that this lawyer, with set jaws, muttered to himself:

"This defendant is honest. I shall not suppress or distort the truth, but, by Heaven! he shall not be made to *appear* dishonest." And so he left the courtroom for the telephone.

When he returned the weakened pugilist had breathed and breathed and breathed and the aggressive pugilist had become disgusted and, in a measure, dispirited. But this Commonwealth's Attorney had, somehow, never been able to find the word "quit" in his lexicon. He attempted the third charge upon the enemy's ramparts, but without avail. He was met by this drawbridge being hoisted in the very face of his cohorts:

"Now, may it please the Court," objected Henderson, "that has all been gone over two or three times. I must object to so much repetition. Your Honor has allowed a very wide latitude already, and we must object to further repetition."

"I think," were the Court's words—music to him of the defense,—"you have been over that several times, Mr. Haggard. Don't repeat. Pass on to some other matter."

So thorough and complete had been the cross-examination, that there remained no "other matter."

"Stand aside," coolly surrendered the sphinx-like representative of the State.

Thus ended the cross-examination of Hiram Dudley. It was a memorable one. To this day they tell you of it in Greenwood.

Dudley's case emerged from the fire very little impaired. He was pressed to say whether he met any other man on horseback as he rode home after several times, Mr. Haggard. Don't repeat. Pass on one.

He was asked to explain why he did not turn back when he heard the shot. He replied that he was some distance from the shot; that the report of a gun in the country, such as he had heard, attracted no particular attention. He was closely pressed to tell if a man had fired the shot and immediately leaped on a horse and hurried down the road, *going the same direction he was going*, if he would not have heard him or seen him. He answered by saying he did not hear or see any person after he heard the shot. Haggard then inquired if it was possible for a traveler on that road to go south from Thomas' house without traveling the "identical road you were traveling?"

"Yes, it is possible," he had answered. "When you leave Thomas' gate going south toward my house, there is a short distance from Mr. Thomas' gate a by-road that leads off into some timber and again enters the main road *below* my house. We

use that by-road in winter, when the main road is bad."

"Would the traveler reach or pass Burnley's before he reached this by-road?"

"He would not. If he took the by-road he would circle Mr. Burnley's and would not pass his place at all."

## CHAPTER XV

"RECALL Mr. Burnley," said Henderson, when Dudley had concluded.

"Mr. Burnley, when you saw Dudley ride by your gate on this night, was there a white dog following him, or with him?"

"I did not see any."

"After Dudley passed, did you still remain there watching for foxes and thieves?"

"I did."

"Did you ever see a white dog pass there on that night?"

"No, sir."

"Watching, as you were, would you have noticed such a dog had it passed?"

"I'm sure I would."

"That is all," by Henderson.

"Wait just a moment, please," said Haggard. "Either just before or just after Dudley passed your place going toward his house, state if any other person passed there that night?"

"I am positive none did."

"Stand aside."

"One moment," said Henderson. "Could a man traveling horseback leave Thomas' place, going south, and go a mile or two south without passing your place?"

"No, sir — yes; I was too fast there. A little way from Mr. Thomas' gate, south, there is a by-

road that goes off into some timber. We call it the wet weather road. You can go by that road and come out on the main road down below Dudley's."

"Zed Dance, please," from Henderson.

Mr. Dance being duly sworn, deposed that he lived in the Thomas neighborhood; had lived there many years; knew all the parties in interest; remembered the occasion of Mr. Thomas being killed; went over to the Thomas place next morning when he heard of it. Replying to questions, he said:

"I live kinder between Thomas and Burnley, south of Thomas, angling."

"Do you live on the main road?"

"No, I live off the main road on a sorter by-road — wet weather road, I call it; leads off the main road near Mr. Thomas' and runs by me, and on down further it runs into the big road again."

"Now, the afternoon after the night of the killing, if you found anything on your place, just tell about it."

"I found a gun. I went down into my lower field that lies on this road — we were talking of fallowin' for wheat land. Just over my fence, in the weeds, as I was walking along, I struck something. I looked down, saw the gun, and picked it up. It was a single-barreled muzzle-loader. I give it to the county judge."

The gun was here produced and identified.

"Was it loaded or empty when you found it?"

"It was empty — just like it is now."



"Could you tell, from examining it, whether it had been recently fired?"

"No, I couldn't, because it had been pitched over the fence, muzzle forward, and the barrel had stuck in the mud."

"Do you know whose gun that is?"

"I've heard, but don't know myself."

"Ask him, gentlemen," said Henderson.

"Were you asleep from ten to twelve o'clock on the night of the killing?" asked Haggard.

"I was awake and up all night—had a sick child."

"Did you hear or see any person pass your place between those hours that night?"

"No, sir—none at all."

"Do you think you could have heard had such been the case?"

"Looks like I would. My house is close to the road. There's a rocky hill along there and we had windows and doors open."

Ben Hobson, next called, deposed that he conducted a little repair shop next door to the Hanna House and had done so for several years.

"Do you recognize this single-barreled gun?"

"Yes, it is my gun."

"Where did you get it, and when?"

"About two years ago I had a bill for repairing old uncle Charley Judson's watch—he's the old darkey that lives down the street here. He left me the old gun to pay the bill."

"Did you sell or give the gun away?"

"Didn't do either."

"How came it out of your possession?"

"I can't tell you to save my life."

"When did you first miss it from your place?"

"Last August."

"Do you recall the occasion of Mr. Thomas being killed?"

"Yes, sir."

"With reference to that date, when did you miss it?"

"I missed it the day he was killed. I believe he was killed on August 14, and I missed that gun early that day."

Haggard declined to cross-examine. He arose and objected to "all this stuff about this gun. What bearing has it on this case?"

"The defendant pleads not guilty," said Henderson. "Any fact tending to show that Dudley did not fire the shot is competent. Therefore, it follows any fact tending to show that some other person fired the shot is a fact tending to show that the defendant did not do so."

"Go ahead," said Lowden. "I'll have to watch this evidence as it comes. I can't pass on it by piecemeal. I'll control it by instructions, if necessary. Proceed, gentlemen."

"Recall Mrs. Thomas, please," said Henderson.

"Mrs. Thomas, please describe the appearance of the man who came to your husband's gate the day previous to the killing and there talked with him?"

"I can hardly do that. He was about your size,

I reckon, middle-aged. I remember he had a dark brown beard. That's about all I noticed."

"Call James Hanna," directed Henderson. A faint reminiscent smile lit up the countenance of Judge Lowden — so well and so truly did he know the witness whose name had just been called.

"Watch something drop," murmured Haggard to his associate. Hanna was pitching horseshoes in the court-house yard. He soon entered, carrying a sort of ledger under his arm. Was sworn, or attempted to be sworn, by clerk, Tom New. Hanna, however, looked full at the clerk, knowing that official so well, whereupon the aforesaid New immediately became a living illustration of the word *confusion*. He pushed a large order book off the rail of his apartment and concluded the performance by swearing Old Jim to "well and truly try the issue joined between Dudley Hanna and Hiram New," etc., etc. Later when New was joked for his blunder, he, without hesitation or compunction, declared the proceedings had grown dull and he really rendered the performance "on purpose to liven up things a bit."

"Mr. Hanna, you conduct what is known as the 'Hanna House' in this city, do you?"

"They say I'm guilty of that charge," he duly replied.

"Do you keep there a hotel register, on which your guests register their names?"

"Yes, sir; here it is."

"Will you examine the register on the date of August 12 last, and see if you had any guest on

that day who registered from Leavenworth, Kansas?"

"Yes. Patrick Dunavan, Leavenworth, Kansas. He registered for lodging August 12 and registered off for the early morning train August 15."

"Look and see what room he had?"

"Number sixteen."

"Were you at that time a regular subscriber to *The Farmer's Gazette*?"

"I was."

"Do you know whether any copies of that periodical were in this room number sixteen at the time this man had the room?"

"I am sure there was, for this reason. We always let the old papers and magazines accumulate at the hotel. They were usually piled in a little paper rack we had, and that rack has been in sixteen for several years, and is there now — full of such papers."

"Do you recall anything about the personal appearance of this man Patrick Dunavan?"

"Only this. He was very dark, and I remember thinking he was the darkest-looking, queerest-talking fellow I ever met to have the Irish name — Pat Dunavan. I know he was not Irish."

Hanna was not cross-examined.

Haggard was ignoring this line of evidence as altogether too far-fetched to merit consideration.

Mrs. James was next called. She testified that she was at the Dudley home the afternoon of August 14. She corroborated Dudley's statement

regarding his bandaged finger. She herself, she said, had tied it up with a bit of dark calico while Mrs. Dudley was busy with the yarn. Mrs. James was over at Dudley's again the next morning and observed the same calico bandage on Dudley's finger. She joked him, so she said, about having a nurse who could tie on a bandage that would not easily come off.

"What were Mrs. Dudley and Miss Holland doing when you reached there on the 15th—the morning after the tragedy?" asked Henderson.

"They were on the kitchen porch picking some doves Hiram had killed. At least they said he had killed ——"

"Don't tell what they said," interposed Haggard.

"Well, they were picking doves on the porch."

Mary Holland was then recalled. She testified to Mrs. James' statement as to the doves, with this addition—she saw Dudley the evening before when he came from the pond with the doves and the gun. She also corroborated the statement of the defendant and Mrs. James as to the bandage. She further swore that the setter dog was in the hall, asleep on the floor, when Dudley came home the night of the tragedy. The dog had growled when Dudley's steps were first heard on the porch. She had told Dudley that evening that the Jasons wanted him to sit up with Mr. Jason that night. Mr. Crews had asked her to tell him.

After a cross-examination of no importance Mr. Crews was called. The sheriff advised that Crews had gone out in town, but would return in a short

while. As it was now past noon the court took a recess.

On reconvening, Crews testified that he had been down at Jason's on the night of the 13th of August. When he left, Mr. Jason, the sick man, requested him to ask Mr. Dudley to come down the next night to sit up with him. He agreed to get him word. Mrs. Jason was not then in the sick-room, but he, Crews, presumed she understood the matter. Crews further stated that he saw Miss Mary Holland the next morning, the 14th, and sent the message to Dudley by her.

Mr. Jason, next called, fully corroborated Crews as to telling him to get word to Mr. Dudley.

Mrs. Jason deposed that on the afternoon of the 13th Mr. Grayson was at her house to see Mr. Jason. When he left she walked to the yard gate with him. They were talking about Mr. Jason's progress. It occurred to her, she said, to arrange for someone to sit up with Mr. Jason that night, the 13th, and she suggested Mr. Thomas. Mr. Grayson replied that Mr. Crews had volunteered to come that night, the 13th. She then told Mr. Grayson to see Mr. Thomas and request him to come the 14th. He agreed to do so. Her husband did not know she had arranged for Mr. Thomas for the 14th and she did not know he had arranged for Mr. Dudley to be there. Mr. Grayson had since died.

Henderson knew that Haggard would pounce upon this. He could have had the witness proceed further or he could stop and suffer Haggard

to draw it from her. He reasoned, and with manifest wisdom, that a fact favorable to you is more potent if brought out by your opponent. Hence, he turned the witness over.

Haggard quickly seized the apparent flaw.

"Mr. Thomas did not come to your home on that night, the 14th, did he?"

"No, sir."

"Don't you know he was in his bed asleep and had no plan at all to go to your house?"

"I suppose, from what I have heard, he was asleep."

"Mr. Thomas was neighborly enough to have come, had you sent him word to do so, was he not?"

"I am sure he would have come had we wanted it. That afternoon my husband expressed pleasure in the expectancy of seeing Mr. Dudley that night, whereupon I remarked that Mr. Thomas was to come. Mr. Jason said he had sent for Mr. Dudley. I said I had notified Mr. Thomas. Then the mistake was first discovered. We then, as Mr. Thomas was so much nearer, sent him word not to come that night."

"By whom did you send the word?" asked the nettled prosecutor.

"I was then alone with Mr. Jason and there was no person by whom I could send him word. I went out to my gate, thinking I would wait until perhaps I could send word by some passer-by. Presently a stranger passed, going in the direction of Mr. Thomas'. I asked if he was going that

far, and he nodded his head. I then sent the message by him. I never saw him before and haven't seen him since. He was dark, wore a beard, and I could hardly understand his English."

"That will do," said Haggard.



## CHAPTER XVI

HENDERSON then proceeded to call a dozen men of standing, by whom he established his client's reputation for peace, good order, and quietude in his community. One old farmer, answering the stereotyped question, said, "It's good, except when he's riled." He was Henderson's only regret out of the twelve. He then called little John Dudley, the eight-year-old lad who had testified for the State earlier. The boy gave a graphic account of his father killing the three doves. His bright, cheery face captivated his auditors and his child's prattle drove home unerring shafts of truth. Henderson was so delighted with the evident impression the boy was making he was loath to conclude his examination. This was the defendant's parting shot. He was about to close. All things, however, must end at one time or another, and finally Henderson said, with an I-dare-you-to expression, "You may ask him, Mr. Haggard."

That lawyer was just at that moment revolving in his own mind a sort of "To be or not to be" proposition, and still reflected while the boy-witness innocently and fearlessly looked at him. Just as Haggard had concluded to ask the question a keg of dynamite or jug of nitro-glycerine exploded — touched off by a manifestation of tenderness ineffable, found only in childhood. The youthful witness, looking straight at Haggard, said:

"Why do you hate my papa so hard?" and a great glistening tear rolled down his ruddy cheek.

Haggard, somehow, managed to say:

"Why, my little man, I do not hate your papa."

"Papa said you didn't; but you want to send him away."

"That is all, my boy; you may go," said Haggard, and the unconscious victor went back to his father's side.

"The defendant will rest here, your Honor," came from Henderson. As this valiant fighter resumed his seat, he gave due and devout thanks for the creation of boys, and one boy in particular.

If you who read these pages have stood in the forum circumstanced as was Henderson, words of explanation would be as carrying coals to Newcastle. As there is a crest to every wave in the sea, a supreme height to every storm, so there is a supreme, tense, vital moment in every great trial. Men will ask how a ruddy cheek, a single sparkling tear, a child's voice,—trivialities of no consequence,—can bear heavily and irresistibly in the scales of justice. Psychologists, not lawyers, must give answer. Answer me how the flash of a leader's eye in a twinkling at supreme moments turns the tide of battle and makes a thin, wavering line an irresistible, victorious legion of conquerors?

Haggard could do battle with the bold perjurer. He could tower high above the overawed and cowering exaggerator. Easily he could drive to quarter over-ready witnesses who faced his iron visage. Past-master in repartee, he had grown accustomed

to vanquishing. But now he felt limp and helpless. He wondered if any others observed it. One did, and drank to its depths that cup, aye, bowl of joy. The prosecutor's listless form lay stretched out, figuratively speaking, and at least one observer there was — Henderson.

But this business of which we write admits of no tears over spilled milk. There is, instantanè, another pail of fresh milk, as witness:

"Call Mr. Jones," and Haggard was going into his rebuttal.

Jones denied the conversation with Dudley, as had been detailed by the defendant. Henderson, somehow, had a profound contempt for the afore-said Mr. Jones. He fancied that Jones was swearing falsely. Quite true, it was concerning a minor matter, but this was a case involving a man's life, as Henderson reasoned, and he who would gratuitously lie in such a cause was a reptile to be shunned by all men. Forgive the zealous lawyer if he revenged himself on this witness. Here is how he chose to do it, simultaneously impairing the value of his adverse testimony. Haggard concluded his examination of Jones, and said:

"Ask him, Mr. Henderson."

Henderson made no response. He had his head turned rather away from the witness, and was *apparently* looking over his notes. He seemed not to hear Haggard. The prosecutor repeated his words, and still Henderson did not hear, so occupied was he with his notes. The Court then said quite audibly:

"Mr. Henderson, do you care to ask the witness?"

"What witness, your Honor?" thrust Henderson. "Oh, I beg pardon! is Mr. Jones on the stand again? I did not know he was testifying. What did your Honor ask me?"

"Do you care to cross-examine the witness?" replied the Court.

"Not at all," and Henderson again went to his notes, whereat the said Jones slunk away, feeling and looking as if he had cut but a small figure with his evidence.

Haggard proceeded to the "gap-filling" process, and called several witnesses touching minor details. Shortly thereafter, consulting his associate, he finally closed the evidence for the Commonwealth. The defense had no sur-rebuttal and the court reporter put his pencils in his pocket and pushed back his small table.

Judge Lowden, contrary to the wont and habit of some distinguished jurists — who shall be nameless here — had his instructions fully prepared and ready for the jury. They were models of clearness and brevity. It is believed that when a certain Englishman of another age coined the phrase, "brevity is the soul of wit," he had just heard a court's charge such as were the fashion in that musty, cob-webbian period, and he intended his coinage as pointing a contrast. In Lowden's court the lawyers rarely presented instructions. All counsel, somehow, assumed that the Court could and would present each of the opposing theories

CORRECTLY, *clearly, briefly*, a triangular consummation most devoutly to be wished and always had — in this court.

We shall not incorporate all those instructions in these pages. One chiefly interested Henderson.

"If the jury have a reasonable doubt of the defendant having been proved guilty, they will find him not guilty."

Need it be said that at this particular time Henderson had no trouble convincing himself that this instruction was the very basic-stone of American liberty?

It was determined to have only one speech on each side. Henderson, under a rule of law obnoxious to *defendant's counsel*, and thoroughly sound to the prosecuting fraternity, was the first speaker; Haggard, the last. And this was a danger to be reckoned with. Old Judge Cole, an ardent admirer of Haggard's forensic powers, had often said "that closing argument of Haggard's had increased greatly the population of two certain neighborhoods not far from the towns of Frankfort and Eddyville."

Let the uninitiated, however, bear in mind this truth: the case makes the speech, and a speech is made up of two elements — logic and eloquence. While Haggard would have unlimited supplies of logic, Henderson, who possessed an equal supply of that ingredient, likewise, by reason of *his* case, was surcharged with eloquence, and he made a speech that afternoon. The old walls, the swaying trees outside, the honest old rafters, all, if to any

extent animate, must have been reminded of other days. He argued the testimony from every possible standpoint; he collected his facts and hurled them at the jury rapidly, powerfully. His rich and mellow voice rose and fell as the speaker's needs required.

He said, *inter alia*, that every mortal connected with the case, with one *very small* exception, had his good opinion and esteem; that he should not attempt to discuss the witness, Mr. Jones. When honest men were engaged in a grave effort to investigate facts as clean, honest men should do, the crawling of a small reptile across the floor should not disconcert them.

"I shall not, therefore," he said, "take your minds from potent facts told by clean people, by so much as referring to petty stuff manufactured by a very petty person."

Burnley had seen no gun as Dudley rode by; he had seen no dog, though on the lookout for foxes and thieves. Mrs. James and Miss Holland had demolished the State's theory relative to the white handkerchief. Who was this dark stranger seen talking to Mr. Thomas the day before the killing? Who was the dark stranger who occupied room sixteen at Hanna's hotel? He came on August 12, and left early the 15th. How chanced this shotgun to be missed by Hobson on the 14th? The stranger's room at the hotel was where Hanna kept his copies of *The Farmer's Gazette*. Thomas had lived at Leavenworth, Kansas. The stranger registered from Leavenworth. What did the proof

show Dudley knew of any nine hundred dollar transaction with Thomas?

And so did Henderson swing broadsword and saber until the shadows began to lengthen; but those within the portals of that historic edifice did not observe the fast-falling eventide. The speaker held them within his grasp and played upon their emotions and sentiments as upon a stringed instrument. At the termination of a subdivision of his speech he was reminded by the Court of the late hour, and court was adjourned. A night session was agreed upon. Mr. Henderson was to conclude after supper, and after which Mr. Haggard, for the State, was to close the case.

Accordingly at eight o'clock the "jury assembled according to adjournment." The old house was packed fairly to suffocation. Disgruntled swains, as reward for their thriftiness in early obtaining seats, gingerly resigned them to eager ladies. Dingy lamps, now venerable in service, shed a weird light, a calcium light, as it were, upon the actors in the final act of this drama. The jailer, classified by Judge Cole as "*omnes omnivirum*," looked the part, when he authoritatively pushed his way through the mass, escorting his prisoner. Clerk Tom New, pencils and pens behind each ear, dockets, order books, and file boxes all about him, stood serene behind his railing. He smiled upon a grateful and appreciative constituency. Not content with being merely observed, like the Mad Prince in the drama, he was satisfied he was "the admired of all admirers."

The Judge was on the bench. Dudley sat by his wife and the ever-present boys. Presently, Haggard and Henderson entered, chatting pleasantly. People wondered how these two could thus lie down together like the lion and the lamb of fable. Mrs. Thomas feared vaguely that "her lawyer" had gone over to the enemy. Even Mrs. Dudley, who considered Henderson a veritable Cyclops, for an instant secretly questioned his sincerity. Ah, Public, do you demand that we fight *always*? But that glorious and genuine fellowship of contending advocates — no matter, the story is too long; perhaps you would not understand, after all. Suffice it to say, it has been so since Moses, and will continue until temples crumble and time is no more.

"Proceed with the argument," came from Lowden. A glass of water, a rearranging of the instructions and exhibits, and Henderson was launched into his last effort for this man, this wife, these boys. When he had gone home to his own supper — of which he ate none — his own bairns had romped joyously beneath his feet and swung about his great broad shoulders. The young mother had met him at the gate, the picture of peace and felicity. They all had sat under the great oak in the yard. The sun had gone down gloriously behind the blue haze in the distance, and the soft June twilight, the freshening breeze, the very murmur of approaching night, had soothed and rested him immeasurably.

The children, his boys and girls, romped and



cheered, rolled and tumbled, as free as the passing zephyrs that made the roses nod. These things had stirred the man. Latent powers he knew not of awoke within him. Dudley's boys, somewhat like Demosthenes' pebbles, made an orator. Compassion reached the depths of his soul, and oratory is of the soul, not mind nor heart nor body.

He had thrown off a feeling of sadness as he briskly walked to the court-house. He met Haggard, and they chatted pleasantly about everything — except this case. When he entered the courtroom and pushed his way through the crowded aisle he at once saw the anxious face of the mother. She sat very close to her two sons. The wave passed over him again. He did not know just what it was — fear, anxiety, compassion, hope. All perhaps contributed to that strange medley of emotions.

It was thus the defendant's counsel felt when he arose. Is it any wonder that he made the greatest speech of his career? During the afternoon argument he had noticed two jurymen who paid him no attention. They were respectful, but he knew he was making no headway in that quarter. Their faces were turned toward him, but they were faces that, to an experienced advocate, plainly showed the speaker they listened not. And now they were still oblivious to all his argument and all his appeals. While standing on his feet this lawyer resolved not to sit down until these two *should* hear him. Thanks to his perseverance and eloquence, the tide eventually turned. When other

eyes were wet, one of these loudly blew his nose. "One of them," reflected Henderson. After awhile the other leaned forward, intent, rapt, transfixed, and presently, following what lawyers call an interrogative argument, bowed his head in unconscious assent to the proposition Henderson was advancing. "The other one," thought the speaker.

He was now about to conclude. This lawyer knew thoroughly the one great point touching the subtle and fine art of jury speaking — when to stop. The crowd had gradually increased and surged about him; tables, chairs, railings, all were converted into seats. As he was about to conclude his attention was attracted by something falling at his feet. He stooped and picked up Master William Dudley's cap. He turned, without ceasing to speak, as if to hand the boy his cap. But he did not do so. Master Will and Master John had surrendered their chairs long ago and had climbed upon the large table. It is said that the eyelids of those of eight and six weigh more than do ours. The two boys were curled against each other, fast asleep on the table. A soiled, chubby hand of each hung listlessly over the table's edge. They lay in such position that their faces were directly toward the jury, and the old lamp, hung high on the post in the center of the bar, shone flickeringly and softly upon them. Verily, it made a picture. Henderson, with sentences unfinished, stood stock-still and could not take his eyes from them. The whole assemblage was as silent as the tomb. A pin falling to the floor would have been heard.

It was a strange and incomprehensible thing. Men afterward differed as to the length of time Henderson, the jury, the judge, and the spectators on that side of the room gazed and gazed at those long lashes, curling, brown tresses, that lay upon two beautiful brows of childhood. And while they looked a smile flitted across the face of the younger lad — such as is common to that age in sleep.

“Gentlemen,” finally resumed this human lawyer, “I am done. I have no words adequate to thank you for listening to me for so long a time. If in your judgment I have overstepped the limits and have consumed too much of your time, forgive me. This is the supreme hour of my life. When I look at that table there something tells me that a just God will lead you. What a picture! They went fast asleep with their father’s life hanging in the balance. As they sleep they trust in you. Ah, gentlemen, one of them asked me if you men had any little boys. I thank God I could tell him you all had. What a solace to know that in this country the men who try other men charged with crime must be housekeepers! Time has taught us that fathers and husbands know all about the passions, emotions, and sentiments of men. Even as these lads, peacefully sleeping there, have entrusted their father to you, so do I. No doubt they are dreaming of the romp they are to have with ‘Dad’ to-morrow *at home*. And did you observe one of them smile in his sleep? Did the little fellow, in his dream, see his great-hearted father entering his gate, once more to grab him up and

press him to his breast? Perhaps he saw the angels come down softly from heaven and unlock his iron cage to free him. Perhaps" (one of the jurymen had recently lost his only boy—a lad of seven years) "some other little boy yonder in the heavens looked down and smiled upon him, and in his dream he heard the small voice say 'Don't fear, Will; there's one on that jury whose heart is big and tender and kind.' Oh, gentlemen, to take this man's life while they sleep and dream and smile, to roughly awaken them in a few hours, when they say 'Where is our father,' to reply, 'We killed him while you slept,' is this the thing this great and powerful State demands?

"Let not my learned friend upbraid me on the charge of attempting to excite sympathy. That is not my purpose. I am talking about the terrible gravity of taking this innocent man forever away from this wife and these boys. I am guilty of pointing out the consequences of a mistake in your verdict—not attempting to play upon your sympathies."

And so Henderson concluded and took his seat, weary, worn, and exhausted.

## CHAPTER XVII

It were needless to report *in haec verba* the close, powerful, eloquent argument of Ben Haggard. He was master of satire, eloquence, logic, pathos. At one time Henderson inwardly trembled, for it looked as though the almost irresistible prosecutor would sweep the jury from their moorings. With consummate skill this veteran advocate minimized the strong points that stood out in favor of the defendant, and correspondingly magnified, illustrated and elaborated the wonderful chain of circumstances favorable to the State. With merciless sarcasm he frequently referred to "Henderson's man of straw from Leavenworth." There was, he said, the night horseman, the empty shotgun, freshly fired; the tell-tale gunwad, made with Dudley's newspapers; the gun being hung upon the wall at midnight, the blood-stained handkerchief, the white dog leaping the fence and following the horseman; the wild flight homeward; the ill-will and threat, a perfect case of the motive for murder, and, lastly, the dead man, ere he died, calling Dudley's name, just as the cowardly shot was fired; to say nothing of the tracks, footprints that the defendant's shoes exactly fit.

"Can you twelve men," he thundered, "be blinded to your solemn duty to society and to yourselves, by a reckless, impassioned appeal for wives and children, in no wise charged with crime in this

case? If that's to be the ruling method in this court, it were well to abolish the whole system and go back to the barbaric code of the survival of the fittest, for every assassin, every thief, every criminal, has a wife, a child, a mother, a father, a sister or brother or some relative whose poor heart must bleed."

And Haggard, fierce, eloquent, gentle, logical, swept on and on, until it seemed to the patient little wife of the defendant that her heart died within her. Once she had whispered into Henderson's ear: "Can I make a statement to the jury?" and she scarcely heard his reply, "No; that would never do. Don't let all that stuff worry you." Oh, Henderson, thou consoler! There was just this difference between the lawyer and the woman. They had the same degree of anxiety, but very different powers of concealment, that was all.

Once Henderson objected to a certain line of argument, and immediately regretted he had done so. The Court merely said,

"I think it is responsive to the preceding argument."

Finally, after what seemed to Henderson an age, Haggard concluded. The Court looked at his watch. He reflected and said to the jury:

"Gentlemen, it is late. I will not submit this case to you until to-morrow morning."

Then followed an admonition to the jury, as to their course and conduct in the interim — one characteristic of this great, just, and judicial judge, and one that ought to be written in the statute laws

of the Commonwealth. Perhaps (who knows?) Judge Lowden had learned it to be unwise and injudicious to permit a jury in a *doubtful* criminal case to retire to the consideration of it immediately following the prosecuting attorney's closing argument. It were more sane and calm and judicious to let them coolly consider, than to rush them to a verdict on the heels of a powerful closing speech.

So the court adjourned, the sleeping cherubs were awakened, the curious departed, the defendant led off to jail. There on his iron bed, in his iron cage, he slept and dreamed and tossed. His dreams were alternate in extremes. Once he saw his home — his castle: his wife, busy in domestic tasks, singing the clean sweet song of labor; his ideals, the boys, rollicking in the irrepressible, untamed ardor of their years, and *himself* among them. Then the incomprehensible panorama changed, and he saw the gaunt outlines of a scaffold. A young man was being quietly led up its short, yet long, stairway, while a fair and beloved young woman, comely, pale, trembling, supported herself clutchingly against one of its columns. The sun was rising and its darts of gold lit up the vast vault of God's heaven. Someone inquired, and he heard a voice saying, "There is Dudley, the murderer." Here he had started in his sleep and thrust out his hands. They struck the damp stone wall of his cell, and he was awake, shivering, trembling, great drops of perspiration on his brow. He slept no more, for the gray light of day-dawn was stealing over the earth.

O thoughtful reader, let courts and juries ponder long and well this soul's suffering. Guilty, his suffering is immeasurable; *innocent*, it is illimitable, boundless, utterly hopeless. The writer of these crude lines has, like you, stood before the all-powerful twelve and demanded an eye for an eye, a tooth for a tooth, a *life for a life*; and has had such request granted; and has seen, in the cold gray dawn, the mute victim, cowed, terror-stricken, helplessly led to his death, his quivering, wriggling form dangling, jerking, writhing, then quite still, save for the slight swaying in the soft breeze. The wise men have not yet declared this to be a relic of barbarism — not yet. Perhaps they never will. Perhaps such is not the case. Organized society, with its complex and manifold problems, may not be able to survive without this terrible weapon of self-preservation. It would be the purest *dicta* to give expression here touching such a subject.

Upon the reconvening of the court a crowd — strange, curious morbid Public — was on hand when Judge Lowden handed the jury the indictment and instructions and sent them to a room to consult upon their verdict. When they had gone the business of the court resumed its wonted grind. The very first case called, an indictment for disturbing public worship, brought from Haggard his copyright phrase, "The Commonwealth is ready," and Tobias Mathews called the names of not less than forty witnesses, more than half of whom (to the infinite surprise of the aforesaid



Tobias) were absent. That versatile barrister had reason to flee from the wrath that was to come, and while he is laboring heavily with his affidavit for a continuance, let us return to the chief of the *causa celebra* at this term.

Time wore on. Our curious Public thinned out. Predictions of an early acquittal and an early conviction were steadily merging themselves into the belief that a "hung jury" would result in the Dudley case. Ten o'clock came, and yet no word from the jury room. Eleven o'clock, and still no appearance of the jury. Just before the time for the noon adjournment, while Captain Henry was gallantly and heroically demonstrating that Doctor Spruce's Green Bitters *was not* an intoxicating liquor, according to an intelligent and sensible interpretation of his Honor's instructions, the all-thrilling tidings were whispered about that the Dudley jury was coming with a verdict. As if by magic, our redoubtable and irrepressible Public, come to see the wife faint or the defendant turn pale, had returned to their respective points of vantage, and with bated breath watched the weary twelve file into court. Captain Vance, glasses on nose, white paper in hand, led the silent, ominous procession. When the jury had been called, the Court, addressing Captain Vance, said:

"Read your verdict, gentlemen."

Thereupon the foreman readjusted his glasses and amid deathlike stillness read:

"We, the jury, fail to agree. — Zed Vance, foreman."

Another admonition, and court took the noon recess. At one o'clock the jurors were again sent to their room. All the long hot afternoon they debated, argued, pleaded — with no result. Various rumors were afloat as to how "they stood" — one as reliable and trustworthy as another. Passers-by beneath their window heard, once, high and angry words. At five in the afternoon Judge Lowden, giving up hope of an agreement, had the jury brought into court, and inquired if there was any prospect of a verdict. "None whatever," spoke up two determined voices at the same time, and the experienced judge knew that these two men were the leaders of the two factions of the jury. They were, then, with the thanks of the Court, discharged "from further consideration of the case."

In thirty seconds it was known of all men how the jury stood — six for conviction, six for acquittal. Of the former, two were for the death penalty and four for life imprisonment. So ended the trial of the Commonwealth v. Dudley.

## CHAPTER XVIII

THE aftermath of this case does not concern this chronicle, but if perchance there be those who have cultivated an interest in defendant Dudley, his wife, and two superb boys, a brief word of explanation touching the conclusion of this remarkable case will not be without interest to them.

At the following October term the case was by common consent continued, counsel on each side feeling the utter impossibility of engaging again in that titanic struggle so soon after the mistrial. At the February term next the long and desperate struggle was renewed with redoubled vigor. As is quite frequent, each side had strengthened perceptibly. Each now knew all the details of the other's theory. In the midst of that raging battle, in which victory wavered alternately from one side to the other, a strange and remarkable event occurred — abruptly terminating the proceedings. It was this. On the second night of the trial Ben Haggard walked into Judge Lowden's room at the Hanna House, his face whiter than Lowden had ever noticed it before. Dropping into a chair, he handed an envelope to Lowden, saying:

"The County Judge has just come by and given me that letter, which he received in to-night's mail. Read it."

Lowden opened and read these words:

"LEAVENWORTH, KANSAS, February 8, 18—  
"THE COUNTY JUDGE,

"Greenwood,

"Mecklenberg County, Ky.

"*My Dear Sir:* I have just witnessed a sad and melancholy spectacle — one of the strangest in my long experience as a priest, and was solemnly commissioned by a dying man to write to someone in your county. This morning I was hurriedly summoned to the Emergency Hospital in this city, being told that a dying man requested my presence there immediately. On reaching the hospital I was told that one Ricardo Ferrago had been crushed under the wheels of a train, and had but a few hours to live. When I reached the poor man's bedside, he was in agony — more the agony of soul than of the body. 'Oh, holy father!' cried he, in broken English, 'my soul is burning and you can save me. Will you beseech the Holy Virgin to forgive, forgive, forgive?' I calmed the dying man, and prayed with him. I assured him that ere he faced the God of us all he should confess and repent all his sins. He said he had sent for me to tell all; that he was a murderer, a foul, black, cowardly murderer. After this he raved and cursed and was quite delirious. Suddenly, however, his full faculties were restored. He was calm and bid me sit on his bed and hold his hand while he should relate his crime. Omitting his broken English, this is the terrible confession he made:

" 'Holy father, may the Blessed Virgin pity me

and give me strength to relate all to you. I am a dying man. I can feel my heart's blood growing less and less, and before the sun sets over there I shall be dead.

“‘ I killed a man. I shot him down without warning. I did it for money—all for money. Years, years ago I came to America from my native, sunny Italy. They told me money grew on trees across the sea. Would that I had remained where God placed me! After a while I drifted into Leavenworth. At the house where I lodged lived a young man by name of Jackson Thomas. In those days he drank, and was wild and reckless. I was near penniless. A low woman in the house enticed us both into her company. She made thieves of us. The three of us planned to rob a safe in a store in our neighborhood. All three of us engaged in the robbing. The woman and I were to watch while Thomas entered, obtained the money, and returned. He entered, put the gold and silver in his pockets, and when he turned to leave the safe he was seized by the night watchman and hurried to jail. We escaped. Thomas was loyal to us, and made no mention of any confederates. He was tried and sentenced to five years' imprisonment. All this time we were in communication with him. Just before he was to be taken to the prison the three of us contrived a plan for his escape. He escaped and was never captured.

“‘ Thomas drifted about and finally settled in Mecklenberg County, Kentucky, near a small town

called Greenwood. He prospered, and the woman and I went the other way. I was desperate for money. I heard from Thomas, and frequently made him furnish me money, threatening to expose him unless he did so. He had married, had a large family, and was an exemplary man. We blackmailed him thus for years. He protested, but always paid.

“‘Finally my troubles came thick and fast, and my fruit business was about to be taken from me and sold. It was mortgaged for nine hundred dollars, and I could not raise fifty. I wrote to Thomas. The woman — she died six months ago, rest her soul! — also wrote to him. He refused to answer. We wrote again. Still no answer. I then in desperation went to Greenwood, Kentucky, and, finding where Thomas lived, went to see him. This was last August, one year ago. He met me at the gate, but refused to invite me into his house. I demanded the nine hundred dollars. I begged for it. I told him if he would only give it to me he should never hear of Ricardo Ferrago again. He expressed fear of my presence in that section. I told him I had registered under an assumed name at the hotel, Patrick something, I forget now. All my appeals were in vain. Finally, in desperation, I told him I would kill him if he refused me. This seemed to alarm him. He was so prosperous and I so ill-used, I envied him. I hated him. I determined to kill him.

“‘I returned to the hotel. A gunsmith had a shop adjoining the hotel — they connected in the

rear. That same afternoon I was in his shop and priced a gun — a one-barrel shotgun. The price was too high. I did not have the money. I watched the smith when he closed his shop. The window was not locked, though the door was. Early in the night I went to the rear of the shop, raised the window, reached for the gun and obtained it, took it to my room and concealed it under the bed. I then went in search of powder and shot and caps — the gun being a muzzle-loading gun. Finally I found a small grocery store and made the purchase. Returning to the hotel, I told the proprietor that I would retire. Reaching my room I loaded the gun heavily, making the wad with some old newspapers I found in the room. I then stole stealthily down the back stairs and hurriedly walked in the direction of the Thomas place. A mile out of town I passed a house on the road. A horse, saddled, was hitched near the gate. Seeing no person about, I quickly mounted the horse and rode rapidly away. It was a beautiful, moonlight night. Once I thought I heard someone approaching, and I turned suddenly out of the road into some trees and soon came to an open field. Without warning, I rode into a high barbed wire, suspended, and cut a fearful gash in my cheek. I sat there, trying to check the flow of blood with my handkerchief. Being satisfied the other traveler had passed on, I resumed the road. When I reached Thomas' place all was quiet and dark within. I dismounted, tied my horse, and went boldly into the yard. Some sheep or goats,

in the yard, frightened me, I came upon them so suddenly. I knocked on the door loudly. At first I heard no sign of life within. I knocked again. Then I heard someone on the inside. I saw a light within. Thomas' voice called to know who was there. In a disguised voice I told him I had an important letter for him. I could see him on the upper stairway landing. There his candle went out. He first opened the main door and later the screen door. The moon was now full upon his face, while it shone upon my back. I said to him, holding the gun behind my back: "Emily and I must have the nine hundred dollars now — will you give it?" He cursed me, and was saying something about damn you, the woman, extortion and all! when I drew the gun, put it at his stomach and fired. He fell, with a groan. I ran through the yard, almost knocking down one of the sheep, leaped the fence, mounted the horse and dashed away. Presently I heard another rider. I turned into a side road and continued, hardly knowing where I was going. Suddenly, I realized I still had the shotgun in my hand. I hurled it over a fence into some weeds. After a little I again found myself on the main road. I proceeded rapidly in the direction of Greenwood. I soon approached the house where I had obtained the horse. The light was burning just as when I passed it shortly before. I dismounted, tied the horse just as I had found him, and walked rapidly into the town, seeing no mortal on the way.

"When I reached the hotel I quietly entered



up the rear steps as I had come out, and was in my room. I left Greenwood early the next morning. At St. Louis I saw in a paper that Jackson Thomas had been killed the night before. O, most holy father, give me some assurance, some hope!

"And here the dying man fell back exhausted. He again revived and I communicated all to the chief physician. He suggested that the dying man sign an affidavit, swearing to these statements. A notary public was obtained and the affidavit made. I enclose it to you, as also a copy of the *Times*, in which you will see a full account of all the long terrible story. Ferrago could not indicate to whom these papers be sent, so the notary and Dr. Meachamp suggested you as the proper official with whom to communicate. Respectfully,

"Your obedient servant,  
"JOHN O'MARA."

Judge Lowden read this document eagerly. He then read the enclosed affidavit and newspaper.

"I cannot say that I am greatly surprised, Ben," said he.

Haggard was silent. He finally arose, took the letter and contents, put on his hat and started to the door.

"Where are you going?" asked the judge.

"First," answered the iron prosecutor, "I am going to Tom Henderson's office, and then he and I are going over to the county jail." And he passed through the door.

And in after years in Mecklenberg County Ben

Haggard had difficulty in convicting on circumstantial evidence. To this day lawyers are heard to say, "Why, gentlemen, lots of you recall the Dudley case, — a stronger case than this, by far, — yet he was absolutely innocent. It is better that ninety and nine guilty men escape than that one innocent man be convicted."

## CHAPTER XIX

SUNDAY came. Judge Lowden and Haggard went to their homes, as did the jury. The old temple, silent, grim, historic, gave out no sound, as Greenwood's citizenry wended their ways to church on that Sunday in June. A rumor, which had gained more than mere current report, had been afloat of late, in which one of our acquaintances, to wit, Judge Cole, took more than a passing interest. The busy dame had it that the redoubtable Cole was about to be "churched." Now, for the benefit of those unenlightened persons, — of whom there are a few in this world, — it is possibly quite essential to define just what that term signified. To be "churched" was to be excommunicated; to be formally charged, tried, condemned. The jurisdiction of the tribunal, which was both exclusive and comprehensive, covered any and all cases of heresy, schism, disloyalty, and that broad category of offenses which for want of specific title in statecraft is generally described as *lese majesty*.

Judge Cole, whose spiritual privileges were now in jeopardy, had not been disturbed by the threatened trial. His constitutional right of free speech was at stake, and he despised the "he who fights and runs away" idea. Now the particular offense charged against him was the use by him of certain language in a recent address to a certain jury in defense of a client accused of vending

liquor in prohibition territory. A certain God-fearing parson, who had espoused the cause of the prosecution and had given it substantial aid in convicting the defendant, had been rather liberally cauterized by Cole in his speech. He had been grossly affronted by such phrases in Cole's speech as "a long-nosed parson, with his affidavit face, buttin' into this case," and "this preacher, instead of proclaiming the gospel from the highways and by-ways, is seen to rush down to the footlights and fire off his horse pistol, to the disgust of justice-loving men and the chargin and lasting mortification of his flock." A third specification appeared in the charge. Not content with uttering these un-Christian comments, the accused had hurled satire, invective, and abuse at the meek and righteous man. His aphorism, "the ministry throwing itself into the scales of Justice, thereby tipping same," constituted no minor portion of the advocate's many offenses.

But the deponent who instigated these proceedings had reckoned without his host. It had not been intended to really try the culprit. It was a measure conceived to overawe the accused, and to extract an apology coupled with assurances of future good behavior. The arrow fell wide of its mark. Not only was Cole thoroughly *unintimidated*, he was ready, willing, and anxious for the fray. He was a member of the bar; he had been engaged in defending a client; his accuser had descended from his lofty eminence and had become a *runner* for the Commonwealth. In addressing the

jury, he had exercised his inalienable and constitutional right of free speech, and had called a spade a spade. His personal liberty, no less than his professional usefulness, was thus assailed. He would show one parson whom he had tackled. He would appeal to the freemen in the congregation. If the worst came to the worst, there were other churches. Since he had heard of the impending trial, he had at once addressed a letter to the offended man of cloth, — who resided out in the country, — from the tenor of which communication that individual readily saw he had stirred up the proverbial hornets' nest. It ran thus:

“JOHN COLE,  
“Attorney and Counselor at Law.  
“Collections a specialty.  
“*Official Attorney for Sheriff.*

“GREENWOOD, KY.  
“REV. (?) HENRY STOUT,  
“Bremen, Ky.

“*Sir* — My attention has been called to a plan of yours to have me churched because I saw my duty and done it. You are hereby informed that I will be at the churching to seize the glove you have thrown down. Please be on hand yourself.

“Yours truly,

“JOHN COLE.

“P. S. — Don't fail to be on hand yourself.”

On receipt of this brief communication the

Reverend Mr. Stout, misnamed by one of those frequent vagaries of nature, promptly decided *not* to be on hand himself. Well did he know the fierce debating powers of Attorney Cole. His faint heart quailed at the thought of having that gentleman's bent finger shaken in his face while his terrible voice thundered at him.

On this Sunday morning we again meet our old acquaintance, Morbid Public. He has, to be sure, heard of the prospective thrilling proceedings, and has turned out *en masse* to witness the event. It was known of all men that Cole, J., had the habit of giving a Roland for an Oliver. Marcellus Jumpus had often ventured the assertion "that old Cole could speak his way out of hell." Only once had his roaring, ear-splitting oratory met with a terrible end. That was recalled by everybody about the court-house.

Judge Lowden had delivered that blow. Cole had been aiding the prosecution in a certain criminal case. A verdict of guilty had been rendered. Defendant's attorney had argued his motion for a new trial. Cole was replying. He had spoken two hours and had advanced, by slow degrees, on to the Court until his outstretched finger almost touched Judge Lowden. His voice was high. He yelled and stamped and perspired, and his black eye glared. There was some question relative to misconduct of one of the jurymen, in which the opposing counsel was in some way involved. Cole had reserved this for his conclusion. He intended to deal "seriously, but frankly" with

the defendant's attorney. And here is how Judge Lowden "squelched" him, as Jumpus said:

Spoke Judge Cole:

"Now, your Honor," he fairly roared, "I am about to conclude. Shall the wheels of justice become clogged up for such a trivial matter? And, sir, I now come to a point in this case directly concerning this defendant's attorney — a point, sir, I would fain omit ——"

"Suppose you just omit it," came from Judge Lowden, in a quiet voice.

Jumpus used the only word when he said Cole was "squelched." He stopped, stared, gulped, his tongue froze. In short and in fine he was literally, actually, indubitably *squelched*.

Our Public on that Sunday morning saw Judge Cole enter the church. He was a prince. Freshly shaven, his mustache cropped a little closer than usual, to give him, no doubt, a fiercer look, he wore his frock coat. Its tails were stiff from lack of use and insisted on standing out. The garment was buttoned in front. He carried his cane in one hand, while the other he kept palm inward, in his bosom. He, with characteristic good judgment, waited until the building had filled ere he made his entrance. Then he entered. With dignity indescribable he walked down the aisle and took a seat at the very front. Those who knew him could detect fire in his eye and a speech — a Cole speech — fairly oozing from his pores. There he sat in the proud consciousness experienced by every general who routs his foe. The Rev. Mr. Stout, as Cole

said afterward, "failed to come to the scratch," and there was no opening of the floodgates of his pent-up oratory.

And this is how it happened that John Cole, Esq., — attorney and counselor at law, collections a specialty; official attorney for sheriff, was *not* churched. This narrative undoubtedly suffers by the *not* in that line, as things of interest would then and there have transpired. However, as truth is mightier than fiction, and as departures in pleading are to be condemned, the actualities only are related.



## CHAPTER XX

MONDAY came, the tenth of June, the seventh day of court. Lowden and Haggard again rode up the main street in the old carry-all. Hanna met them just as he had done the Monday previous. The old bell, through the scrupulous promptitude of Uncle Toby, again gave notice that "cote was settin'." The criminal docket was not yet finished, hence Haggard's return with Judge Lowden. There were several criminal cases to be disposed of, motions for new trials, two bills of exception in which the State's counsel was interested, to say nothing of quite a number of indictments to be drawn.

The court convened and the case of Commonwealth v. Gaines was first called. Mr. Blontz, hailing from another county, announced that he represented the defendant. Now Lawyer Blontz was *a lawyer*. He was thick-set, wore glasses, and looked at one with a vacant, hopeless kind of gaze. Providence in the divine division of things had allotted to Blontz a double portion of self-assurance; but by a singular oversight had neglected to supply a commensurate amount of gray matter. It therefore allowed that the Hon. Blontz possessed all the outward and visible signs of a lawyer without in the least being the owner of any qualifications even tending in that direction. Another singular feature in the make-up of Blontz that is

worthy of mention, was that while all mankind knew his professional limitations and shortcomings, he himself lived in blissful ignorance thereof and reveled in the sweet belief that he was the ablest of advocates, the shrewdest of attorneys, the wisest of advisers. It need not be added that he was the happiest of men. Self-satisfaction dulls the edge of discontent and makes men merry despite any and all other environments and conditions.

So then, patient reader, Mr. Blontz was there in court, looking as wise as a tree — nay, a forest — full of owls. He looked hard at you and straight at you, but his gaze was vacant and the luster in his luminous expression gave token of no single idea. Gaines, his client, charged with selling liquor in prohibition territory, sat admiringly hard by, and feasted his dull eyes upon the great man, his attorney. Ah, lawyer who reads these pages, do not mock your brother Blontz. Like him, you number clients who place you on a pedestal. You are catalogued with Justinian, Blackstone, Marshall, Webster, Evarts, until, until you try your client's causes and — *lose*.

Now defendant Gaines, himself an ox, dully stared at his great lawyer. He was destined to experience even a greater awe and admiration shortly. Blontz arose. He adjusted his glasses. He took up the indictment. His deliberation was pronounced. Perhaps it was exceeded by his absolute confidence in his infallibility.

"I desire to file a demurrer to this indictment," he said, much after the manner of Lord Eldon

delivering a decree. The Court took the indictment. Judge Yust, who was sitting on the bench with Judge Lowden, asked the Judge in a whisper,

"What is his point?"

"He hasn't the least idea in the world," replied the Court.

"What is the point of your demurrer, Mr. Blontz?" inquired the Court.

Blontz arose, read the indictment aloud, and gave this specific and altogether definite reply:

"Your Honor, the indictment fails to state a public offense."

"In what particular?" pursued the now relentless Lowden.

"It fails to give the exact date of the sale. The blank day of March don't mean anything. That might be another sale than the one the grand jury indicted him for," and Blontz proceeded to assign numerous other equally as conclusive and lucid grounds in support of the demurrer. When he had concluded, the Court inquired if he had any other reasons to suggest; to which he replied in the negative. Judge Lowden then ruled thus on the demurrer:

"None of the points suggested by Mr. Blontz on his demurrer are tenable. The indictment is not bad on demurrer for any of those reasons. It is, however, fatally defective in that its allegations relating to the local option law being in force are *in praesenti*. It avers, in substance, that this defendant sold liquor in this county, where the local option law *is* in force, whereas it should be charged

that the law *was* in force at the time the sale was made. Let the demurrer be sustained," and Haggard was listening to the County Attorney's explanation of why the indictment was so clumsily drawn.

"That is all, Mr. Gaines; you may go now," said Blontz to his admiring client. And Blontz and Gaines were seen to leave the court-room together, contented.

"How did you get it throwed out?" asked the merry defendant of the merry lawyer as they crossed the court-house yard, the one fairly basking in the effervescing joy of the other.

"Easy, Gaines, easy," said Blontz, as he wisely winked one of his eternally vacant eyes. "These Greenwood fellows don't know the tricks. A little technicality that I don't use except when necessary. When you get in that court-room you have to work this thing," and he tapped his head with his finger.

"Damned if you ain't a wheel-horse, and that's no mistake," said Gaines, and he paid his fee to his lawyer, while the Mecklenberg County grand jury, to whom the indictment had been re-referred, was finding a new indictment, without the defect and from the toils of which even the admired Mr. Blontz could not extricate the subsequently skeptical Gaines.

## CHAPTER XXI

LOWDEN suffered a sigh of relief when he closed the Commonwealth's docket and called for the common law docket. The criminal session had not been without interest, but to this seasoned and experienced jurist the average criminal case was a bore. With the criminal business concluded, our old friend Morbid Public disappeared. The benches of the temple were empty, nor could a civil cause of gigantic importance entice them thither. Tears, pale faces, weeping widows, tales of pistol and dagger, and the flowing of life blood — these all went out one door while Morbid Public evacuated through another. And now the court went about its business uninfluenced by the approving or disapproving laugh or smile or look or frown of many non-discriminating on-lookers.

An appealed case involving all the thrilling details betwixt a landlord and his tenant over their respective shares in a small crop first obtained the right of way. Cole, for the tenant, stormed a great deal about "honest sweat," "horny handed laborer," "up with the sun," "humble, helpless in a pitched battle with a landed nabob." Captain Henry, noting about nine land-owners on the jury, was fluent touching "trifling tenants," "shirking croppers," "necessity for business methods on the

farm"; and so the mill ground merrily on throughout that afternoon in June and the landlord-tenant cause was concluded.

An action in ejectment was begun and concluded — soon. Tobias Mathews stood sponsor for the plaintiff. Brownlow, for the defendant, had contented himself with merely filing a traverse of the petition, denying *in toto* the plaintiff's title. Of all the weapons in the vast armory of the law a simple traverse by the defendant in an action in ejectment is the most valuable. Doubtless it has won more battles than all the warriors from Alexander to Grant.

Brownlow had filed it and kept his peace. He sat reposing in his chair watching Mathews very much after the fashion of an Indian chief beholding a captive run the gauntlet. The unconscious Mathews, all smiles, bustled hither and thither, speaking to witnesses, carrying deed books, consulting his client. The trial proceeded rapidly enough until Mathews reached the 40's. Here were breakers ahead, but the oblivious Mathews, as blind as the very goddess at whose shrine he worshiped, stalked confidently and merrily along. Abruptly and without warning the ice grew thin. It snapped, opened, and the icy waters engulfed the unsuspecting youth ere he was aware of his fate. Yet he bobbed up smiling, nothing daunted. While the Court was waiting a verdict for the defendant to be signed by the jury, having sustained a motion for a peremptory instruction, Mathews smiled in all directions. As Judge Cole was passing out the

door Colonel Stevens, whom he met, inquired what the court was engaged in.

"Puttin' Mathews on the cooling board just now," said Cole. "They were trying to try a land case. Brownlow denied Mathews' title, and Mathews didn't hold out for the second quarter. He took a balloon ascension, soared and soared, collapsed, and then hit the ground like a thousand brick, still grinnin'. Damned if I believe he knows it yet. Got down to 1844, struck a snag, grinned, gulped, and died, but still grinnin'," concluded the critic, as he passed out to a cane bottom chair under the shade of a great tree, and there resumed one of his chief occupations — sitting down.

That night as Lowden, Haggard, Henderson, and Jim Hanna sat on the pavement in front of the Hanna House, Mathews joined the group. He said he had entertained Brownlow for a while, anyhow. He couldn't understand, he said, the justice of the rule of law that required his client to prove a title from the Commonwealth down, "while the defendant just sits there and don't even open his mouth; and if I fail anywhere along the line out I go, although my man has a deed to the land."

"Well, you see, Tobe," said Hanna, "we have to have rules and regulations about this law business. We can't just turn a fellow like you loose up there and let you run wild. Rules and regulations are as necessary up there as they were to old man Bulcher. Judge," brightened up Old Jim, "have you ever heard that story about old man

Blucher's rules and regulations? You know old Blucher?"

"Oh, yes, quite well," replied Lowden, at once banishing the wise or unwise rule governing actions in ejection and lighting a fresh cigar in anticipation of Hanna's story.

"Well," began that rare and versatile genius, "old man Blucher, you know, loves what we sometimes call the coin of the realm. You may have known men who sorter loved it, but when it comes down to real love, Mr. Blucher's affection for the dollar is in a class all by itself. And then he is a very pious man too. He was in the Civil War, enlisting in some Yankee regiment, like nearly all these infernal Republicans did around here. The old man don't believe in fightin' much. It's not his line. He says the war was the roughest thing you can imagine. Just the other day there was something in the paper about little old fightin' Joe Wheeler, and old man Blucher told me all over again his story about rules and regulations. I call it that, but he doesn't. I'm going to give it to you just like he gave it to me.

"'Jimmie,' he says to me, says he, 'I see they are praisin' up General Joe Wheeler a powerful lot in the papers. That's all wrong. I never did like General Wheeler. He was the roughest, most reckless man I ever saw. In a battle he'd just simply run over you, if you didn't get out of his way. The man wouldn't stop to think nor nothin'; but would come at you like a cyclone, pell mell. Reckless, Jimmie, awful reckless.



“‘ You know, Jimmie, I went into the army when I was a young man. Things were all upset, and I thought it would be a good opportunity to make a little money. You know soldiers are reckless and wild. They don't pay any attention to economy or business or saving their money, and when they've got the money they pay high for things. Well, I had saved some money and so I went in. It was awful rough. Soldiers would curse and drink; didn't make any difference if there was to be a battle next day. You never saw so many reckless, wicked men.

“‘ I thought so long as I wasn't making any money except my pay, I might try to make a little extra money. I got a small camp stove that kinder folded up. I could carry it around with me handy. Whenever we'd pitch camp I would get out and buy some meal and cook corn-cakes and sell them to the soldiers. It was a fine chance to do business. Rations to men was always short, and when they had money I could get sometimes five cents for a corn-cake. They would smell the cakes cookin' on my stove and pay me most any price. Lots of times they wanted to buy my cakes on credit, and once I let a fellow have two and trusted him for the pay. He never did pay me for those two cakes, and I stopped the credit business. You know, Jimmie, it ain't business, and you've got to have rules and regulations in business. So I told the boys that I couldn't sell my cakes without the money. On pay-days I made a lot of money, and saved it all. Once I thought some

soldiers intended to get into my knapsack and take my money, and I kept awake three nights watching it. You know, Jimmie, I had to be careful among all those wild fellows. I tried to talk religion to a big fellow once and asked him to join me in prayer. He said he would if I would sell him some cakes on credit. Of course, I couldn't do that. You have to have rules and regulations about business, and if I had sold him my cakes on credit he might have got killed in the next battle, and where would I have gotten my pay? This big fellow then said he was sick and felt like if he didn't get some good food he would soon die. Of course I felt sorry for him, but I had to have my rules. After awhile he came back and said he would let me take his ring to secure me if I would let him have six cakes. I wouldn't agree to six, and we agreed on four. It was a gold ring, and I sold it afterward for a good profit.

“‘I was making money plentiful. One night we heard that this same General Joe Wheeler in the papers now, was about to attack us. I thought we ought to move out then, as I had always heard Mr. Wheeler was the most reckless man in the Rebel army. But they wouldn't budge. I packed up my stove and got everything ready. Next day Mr. Wheeler charged us with cavalry. You can't imagine how fast they came, Mr. Wheeler in front, runnin' over everybody. He'd kill you in a minute if you just stood there. I never have admired that fellow since. I saw we were overwhelmed, so I got my stove and hid under a log. They were

passing with a lot of prisoners, and I was discovered. We were all taken to Andersonville, the Confederate prison. Of course I was not glad to be in prison, but that was better than fighting, and I was satisfied. You know, Jimmie, the Confederates were not able to feed their prisoners of war, and lots of Union soldiers died from neglect and starvation while prisoners. There were thousands of us Yankees in this Andersonville prison, and I thought it would be a fine place for my business. So I managed to get some meal and fixed up my stove. I sold cakes for large prices. I got watches and rings and trinkets after the money all gave out. They tried to get me to sell my cakes on credit, but I told them I had to go by my rules and regulations. I had my stove out in the corner of the prison yard, under a little plum tree. It was near the high prison wall. We were guarded by sentinels all the time. They walked on the wall with long guns always loaded. One day when some prisoners were trying to get me to sell my cakes on credit, I noticed a long, tall Texas Confederate sentinel on the wall near us. He had stopped his walking and was looking hard at me. He never spoke a word, just looked at me, like he was thinking. The next day a wounded soldier crawled to my stove and wanted a cake. He said he was expecting a letter every day from his mother, with money, and he would pay me when it came. I told him I couldn't do it. The fellow looked honest, Jimmie, but I didn't think he would live a week, and it wasn't business to sell him the

cakes on credit. I explained it to him. The boy actually cried. Must have been homesick as well as hungry. Now what do you reckon happened just then? That long, mean-looking Texas sentinel called to me. I looked up and he had his gun leveled at my head —“ You damned stingy cuss, if you don't make that boy a dozen cakes and give 'em to him right now, I'll blow the top of your head off.” And Jimmie, I believe he would have done it. He was the meanest-looking man I ever hope to see. I tried to argue with him. He cursed and cocked his gun. I told him how much the meal cost me, and he began to count to ten, saying he supposed there would be a dead hog around there soon. I never was treated so bad in my life. That fellow stood there and made me make a dozen cakes for that sick boy. I never got a cent for them. When the boy had eaten them the Texas sentinel told him to come every day at that same time and to bring two other sick prisoners with him each day. Do you know, that man made me make cakes for those three soldiers every day! I believe he would have shot me dead right there if I had refused to make them. I wasn't getting any pay. My business wasn't paying at all. About the fourth day I told the Texas fellow that my meal was all gone and I couldn't make any more cakes. He looked at me, and said when the three soldiers came if there wasn't plenty of meal there, there would be a funeral in that prison soon. He'd done it, too. I had to get me some more meal. I went to the commanding officer and told

him how I was being treated. He looked curious at me and told me to obey the prison guards. He said the big Texas fellow on the wall had killed lots of men, and he hoped I wouldn't make him mad. Of course, Jimmie, I couldn't afford to make him mad. One day they said General Wheeler was to come there to inspect the prison. He was a cussin' man too. He came. He saw my stove and asked mighty rough what I was doing with that thing there. I tried to explain to him, but all I could hear him say was something about "damned vultures living on sick soldiers!" But, you see, Jimmie, I hadn't got paid for all my cakes. Now that very day that Mr. Wheeler was there the Texas fellow made me use up all the meal I had, and I made up several dozen nice cakes. He then sent for about a dozen prisoners and made me give them all my cakes and wouldn't let me ask for a cent of pay. He sat there and watched them eat all the cakes, and wouldn't even let me eat one. He then made me hand him the stove, which he threw over the wall. It broke into pieces. He then looked at me, with his hard and wicked look and said, "Now don't let me catch you around this end of the yard again. Them's the rules, and we have to have rules and regulations, you know." Now, Jimmie, I have always believed Mr. Wheeler put that fellow up to that, and I haven't ever liked him since. Do you blame me?'

"So Tobe," concluded Hanna, "we must have rules and regulations in this law business, just like in selling cakes."

## CHAPTER XXII

THE first case called for trial Tuesday morning was one in which Marcellus Jumpus starred for the plaintiff. Jumpus somehow had heard of the plaintiff's injury, and it need not be said that in due course the plaintiff knew something of his legal rights. Judge Thompson, with a candor that was painful, observed that Jumpus was a *Paracamph* lawyer — the first aid to the injured. Jumpus had explained explicitly such mystifying terms as "gross negligence," "punitive damages," "permanent injury," etc. Early in the game Bill Scott in brotherly sympathy had said to Jumpus, "You had better make that fellow go to bed," and straightway the aforesaid plaintiff had sought and kept his couch — at least for awhile. Colonel Stevens was defending the coal company. He had no concern as to the outcome of the case. Assumed risk was his rapier, with which he proposed to run Jumpus through. The Colonel merely sat steady in the boat and watched the current flow. Captain Henry fairly expressed it when he said to Cole in the courthouse yard, that Jumpus was inside "as busy as a bird dog" with *Hazel v. Blackwood Coal Co.* The observation vouchsafed by Bill Scott was that Jumpus was "carrying the thing too far with his crutch *pendente lite*."

When Judge Lowden called the case, Jumpus announced ready. He had a look in his small eye

that plainly said, "You delaying octopus, at last I have you where you have most dread — before a jury." He rather anticipated that Stevens would move to continue so dangerous a case was this — in the eye of Jumpus. Stevens did not so move. A motion to require the petition to be verified, which had been previously filed, was what he called up. It was sustained, and Hazel limped wretchedly to the clerk's desk to subscribe to the affidavit. When Hazel was thus irrevocably tied to his detailed allegations, an answer and reply were filed and Colonel Stevens announced ready.

From the opening statement, one would wonder how Hazel ever got all his dismembered parts together to come to the court-house. He had been fearfully and terribly cut and bruised and mangled. His left leg was stiff, his good right arm was forever stiff, so stiff he could not raise it at all. Forever it must hang "palsied by his side." His internal injuries were fearful. He had bad dreams at night, could not sleep nor eat. His earning power was totally destroyed and his expectancy was twenty-nine years.

Stevens declined to make an opening statement for the defendant. This displeased Jumpus. He whispered to his client, "Some trick, but I'll watch him." Hazel was called to the witness stand. Jumpus, the picture of sympathy, seized his good arm and helped the "wreck" to the chair. It was quite a task to get this mashed and mangled cripple a distance of six feet, but Jumpus, the sympathetic, finally did so, tenderly and carefully. He con-

sumed some time in this accomplishment, but apologized to the jury, by saying, "Excuse us, gentlemen, but you will have to bear with us, in *his* condition."

Marcellus then proceeded to delve into the long and sad story of Hazel's undoing. Finally, he concluded his examination and said,

"Mr. Hazel, if you want to rest a bit before Colonel Stevens asks you, you may do so."

Hazel sighed, and in a weak voice said he would try to stand it. The Colonel took him gently through what Judge Cole called "a course of sprouts." The witness emphasized the fact that his right arm could not be raised. It hung limp by his side and he was powerless to lift it. That condition had existed since his injury. His back was sprained, his legs were weak, his left one entirely valueless. He had to be almost carried about. It gave him fearful pain to walk only a few steps. But his stiff arm gave him the greatest anxiety. Here Jumpus interrupted the cross-examination to say:

"I did not hear you say just which arm that is?"

"My right arm," groaned Hazel, and Jumpus looked things, though he said nothing. Colonel Stevens completed the cross-examination and turned the witness back to Jumpus, who proceeded to re-examine him more for emphasis than for light. Hazel, between groans, appeared at one time as if he might sing an old song, entitled, "Lead, and I will follow."

Now Colonel Stevens' hat was hanging on a peg in the upright post near the witness chair. The hat was perhaps seven or eight feet from the floor. It



was immediately to the right of the witness, and out of reach of all others in their seats, save the stiff-armed plaintiff. When Jumpus had left the stiff arms and legs and was rehashing some minor descriptive details relative to the place of the accident, Colonel Stevens suddenly announced he had to go to his office for a moment.

"Mr. Hazel," said he quite innocently, "will you kindly hand me my hat there?"

Hazel on the impulse reached high with his right hand and handed the hat to Stevens. In reaching for the hat he had raised his arm easily, quickly, and without the slightest difficulty. Instantly the witness saw and realized his blunder. It was too late. He felt like a bubble being rushed out to the open sea on a receding tide. Jumpus sickened. Captain Henry leaned over to Judge Yust, in the stillness, and muttered, "The walls of Jericho are crumbling." Stevens looked at Hazel, and Hazel looked at Jumpus, and Jumpus looked — nowhere. He helplessly stared into space. Stevens, no word being yet uttered by lawyer or witness, reflected momentarily and then said:

"I don't think I'll have to go. Mr. Hazel, kindly hang my hat up for me."

The man slowly took the hat, hesitated slightly, and with his same right arm replaced the hat on the peg. He could not resist doing it. Some invisible force compelled him — after he had inadvertently made the first blunder. The trial went on, though Jumpus could not put any life into it. From thenceforth he was limp.

At the noon adjournment Judge Beckwith, from an adjoining county, drew up at the hotel. Beckwith, a princely looking man of some fifty-odd years, had been a regular and constant practitioner at the Greenwood bar for more than a quarter of a century. His hair was white, as white as the driven snow, his mustache sprinkled with gray, his frame erect, his countenance kind, merry, handsome. He dined with Lowden, who in two words told him of Jumpus' case then on trial.

Finishing dinner, Judge Beckwith met Jumpus. The latter was in a quandary over his instructions.

"I'm dead sure to get to the jury," he said to Beckwith, which prospect the latter experienced lawyer doubted, in view of some remarks made by Lowden in professional confidence at dinner. Jumpus asked Beckwith if he would write him some instructions?

"You can sit down here," he said, "and dash 'em off in a minute."

Now Beckwith had not been overlooked by the Divine Distributor when the sense of humor was being divided out. And Beckwith was going home on the 3:20 P. M. train. Why not be guilty of a bit of humor? He decided. He wrote a complete set of instructions, and finished them just as the court-house bell summoned the joyful Jumpus back to war. He seized the instructions, pocketed them, thanked Beckwith, and hurried on — to help Hazel to his chair.

Jumpus was beginning now to forget the arm

episode. He argued that he still had other and many ailments, if he had lost the arm. He met the mine foreman at the door and passed him haughtily. Then he, again the essence of sympathy, aided Hazel to his chair, but it was noted he did not duplicate his apology to the jury. He was improved, but still had misgivings.

And so they fought on through the afternoon. Beckwith looked in before he left. They were nearing the end of the evidence, and he walked away, rather more hurriedly than was his custom. Stevens had made his motion for a peremptory instruction. Lowden had overruled it. His lucid and exhaustive opinion in passing on that motion may be summarized into two lines.

"Stevens," said he to that lawyer, "do you suppose this court has the heart to throw old Jumpus out on a peremptory, after that arm tragedy? And then I want to hear Jumpus follow you, anyhow," he tantalizingly concluded.

Stevens finished his evidence quickly. It was short, sharp, telling. He then passed up his instructions to the Court. Jumpus thought of his own batch. He had not read them since Beckwith had prepared them, but he knew Judge Beckwith to be at the forefront of the profession. And then, unlike his colleague Tobias Mathews, he so far recognized his own shortcomings as to force the realization that it was altogether useless for him to read them.

This is what he handed up, and this is what Judge Lowden sat there that day on the bench and read:

## " INSTRUCTIONS

" I — The Court instructs the jury that the defendant coal company was and is an insurer of the plaintiff's life and person, and that when it employed him it agreed and undertook, by implication, to see that so long as he remained in its service it would provide him with a perfectly safe and secure place in which to work, and one in which it would be impossible for him to sustain any injury to his leg, or back or arm (or internal injury), whether by his own negligence or by the negligence of any of his fellow-servants; and if the jury shall believe from the argument of the attorney for the plaintiff that the plaintiff received the injuries complained of while on defendant's premises, and shall further believe from said argument that the defendant is an octopus, or is in any degree related to an octopus, they must find for the plaintiff such compensatory damages as the jury may believe from said argument he has sustained, not *less* than the amount claimed in the petition.

" II — Compensatory damages mean in law the money which the jury has the power to take out of the treasury of an octopus or other corporation and put into the pocket of the plaintiff, and inasmuch as the attorney for the plaintiff is entitled to one-half of this sum for his services as a witness during his speech, the jury are warned that it might be well to award interest on the verdict from the date of the incorporation of the defendant.

" III — Negligence, when applied to the defend-

ant, means its failure to pay compensatory and punitive damages on demand immediately after the plaintiff is injured, whether by his own or fellow-servant's carelessness; and means, when applied to the plaintiff, his failure to sue for such damages at the first term of court having jurisdiction of the crime.

"IV — Gross negligence means any act of a corporation.

"V — Ordinary care means any act of the plaintiff or of the plaintiff's attorney.

"VI — Contributory negligence means the act of the defendant in submitting its case to this particular jury.

"VII — Punitive damages, as used in the instructions, means the amount the jury must award the plaintiff for the stiff arm.

"VIII — Nine or more of the jury may find a verdict for the plaintiff, but if less than twelve agree, those agreeing must sign the verdict."

Judge Lowden saw the trail of Beckwith. He knew at once that the trustful Jumpus had not so much as seen the instructions. He suppressed himself, and quietly put them in his coat.

While Lowden was revising his instructions at the suggestion of counsel, Hazel sighed and groaned. Once, in a weak voice, he asked for water.

"Mr. Sheriff," spoke up Jumpus, "give the plaintiff a glass of water."

And thus the drama, with Jumpus in the center

of the stage, proceeded while waiting the completion of the Court's charge. It was almost finished when an unlooked for and disastrous event occurred.

Jim Higgins, Master Commissioner, of whom we have heard heretofore, rushed wildly to the door of the court-house, yelling "Fire!" at the top of his voice. People broke and ran, pell mell, toward the scene of the supposed blaze. Hazel, he of stiff limbs and impulsive temperament, was the first to leap to his feet, dash from the building and fairly fly down the street, running like a wild deer, his voice at its height, calling "Fire!" The judge, jury, and lawyers leisurely went to the door and looked out. They had all noted Hazel when the alarm was given; they saw him disappear down the street as fleet of foot as any lad of Marathon.

It was a false alarm.

The jury and judge resumed their seats. The people were all returning. The jury waited. Presently, Hazel hurried in. Midway between the door and his chair a thought apparently struck him. He paused and then limped *slightly* to his chair.

Marcellus Jumpus looked at Hazel.

Afterward, Clerk Tom New said he heard Jumpus mutter between his teeth, "Pity you didn't break your damned neck runnin' down that street."

Of course the wind was out of Jumpus' sails. In truth, they hung limp and lifeless. Stevens spoke briefly, ten minutes. Jumpus tried to reply. Once he very nearly "got up steam, but his pipes were plugged," said Captain Henry. That was

when he injected into his speech something about a probability of Hazel's mind being weakened by his long and intense pain and suffering. Finally, he resumed his seat. Higgins, the fire alarm expert, looked in at the door, but passed on. Very soon the jury returned a verdict for the defendant, and court was adjourned for the day.

That evening at dusk Judge Cole, coming up Main street, met Jumpus standing on the corner at Barvis' drug store. He wore a countenance of anger. In his hand he carried a huge stick or club. "Hello, Jumpus!" greeted Cole; "what are you doing here?"

"I'm waitin' for Jim Higgins and his big mouth," responded defeated hope—and he was. Had the worthy Master Commissioner ventured thither at that hour the prediction may be safely indulged that some person other than James Higgins, Esq., would probably have filed a report of assets and liabilities in a suit to settle the estate of a certain demised citizen of Greenwood, Mecklenberg County, Kentucky.

But the fates guided Higgins that evening, and he came not.

## CHAPTER XXIII

WHILE Captain Henry and Judge Cole were friends after the manner of a rather loose construction of that term, and were daily thrown into pleasant contact one with the other, yet there was a certain element of jealous envy, poorly concealed, in each for the other. If one would say to Henry that Cole was "a fine lawyer," the former invariably replied, "Yes, Cole is a *fairly* good lawyer." If you had occasion to animadvert on Henry's talents to Cole, the latter would say, "Yes, he does right well." Once when Captain Henry said something about his authorities, Judge Cole had remarked that no authorities would ever be produced, as "Henry practiced altogether by ear."

On this Wednesday, the ninth day of the term, the twelfth day of June, these two belligerents were lustily pounding each other in the famous "horse-swappin'" case of *Sledge v. Goad*. A mistrial in the quarterly court, verdict for plaintiff for \$58 in that tribunal, an appeal to the circuit court, two mistrials therein, and this, the third effort, was the expensive and long drawn out history of this now famous cause.

The recovery or non-recovery by the plaintiff was now in itself an insignificant matter. It had degenerated into a death struggle for costs. The last taxation, thanks to the thrift of the irrepressible New, showed an accumulated bill of \$277.60



to be paid by the unsuccessful party. Each litigant was amply solvent, hence two titans held the forum, trying, as Jim Hanna said, "to get from under." An imposing array of witnesses had caravanned to each trial, sworn lustily, claimed their attendance, heard of the hung jury, and bided their time against the next calling of the case.

Now, in horse cases, wherein is involved the large question of fraud and misrepresentation, the qualities, traits, and defects of the respective animals, there is a vast and comprehensive latitude both in veracity and knowledge, particularly the former. Molly, the gray mare, was quite easily proved the best and soundest of animals, free from any defect. Likewise, Beck, the mule, whose character and reputation were in the limelight, was handily shown to be the best and most amiable of toilers, with never an inclination to kick, even turning her other cheek when assaulted. These two propositions being indubitably established, it was then quite satisfactorily made clear that both Molly and Beck were victims of all the ills that horse and mule flesh are heir to. Each was moon-eyed, each was thick-winded. Molly would eternally balk, while Beck would lie down, accoutered. In short and in fine, Sledge had traded Goad a first-class animal, receiving therefor a diseased and worthless one, and Goad had likewise traded Sledge a model mule, only to be handed a blind imbecile of a mare in return. These utterly hopeless and irreconcilable facts were proved by two score of witnesses.

Hence the repeated occurrence of that which the public cannot always understand — a hung jury.

We shall not encumber these pages with the many fierce tilts between Judge Cole and Captain Henry, now transformed into "Mr." Cole and "Mr." Henry. Suffice it to say, the case was "practiced by the Code." Nothing was waived or agreed to. Toward the conclusion the fight was fast and furious, and looked favorable for the defendant. An insignificant incident turned the tide of battle and gave Judge Cole a signal victory. Lest some other advocate in some other age and under some other sun may make the same irretrievable error, the story of what happened is here presented.

The evidence had been concluded and the argument of counsel was about to begin. Under the pleadings, the *onus probandi* was on the defendant, which, of course, gave to his counsel that priceless and effective weapon — the concluding argument.

Lawyers, you have heard advocates *claim* they preferred the first address to the jury. Heed them not, for they know not what they say. There is this immense difference between the first and last speech. The first advocate must do these three things:

- 1.— Argue *his* case.
- 2.— Anticipate his opponent.
- 3.— Leave no gaps unclosed.

Now the concluding attorney has this one broad license:

1.— Say what suits him.

As Judge Yust frequently said, he who would voluntarily elect to make the opening address instead of the closing one was a fit subject for the court, *sua sponte*, to appoint a *guardian ad litem* to represent.

Judge Cole was afraid of Henry's closing argument. Vainly had he fought for the burden of proof — beginning his fight *after* the pleadings had been made up. His idea was that the plaintiff, being plaintiff, was entitled always to open the evidence and close the argument. Sorely was he disappointed when the Court ruled otherwise. Eventually, it made victory perch upon his banners in a way not dreamed of, all of which was in manner and form as follows, to-wit: Judge Cole, sponsor for the gray mare, launched forth. He sang pæans to her many virtues and flung out some strange words about Pegasus. He said that Henry and the plaintiff and the mule were similar in their stubbornness and disposition. At this comparison, more or less odious, Captain Henry made an error. He left the court-room, concluding to remain out of hearing until disagreeable personalities were dropped, and with the further design and purpose of sharpening his eloquence with a tool he had used before, to-wit, one very long and tall drink from Jim Hanna's most recent jug.

Now, he who is to follow ought to hear every word of the first address. He should hear every argument, illustration, interpretation of law and evidence, every figure of speech, and particularly

every anecdote that emanates from him who is to be followed and — emasculated.

Judge Cole told an anecdote in that speech. It was a long and side-splitting affair. It required, in its many details and ramifications, not less than twenty minutes of time. This was the twenty minutes Captain Henry *was out*. He left the courtroom just before Cole began his story and returned thereto just after it was finished. Cole was reminded of the story by the testimony of one of defendant's witnesses. He began somewhat after this fashion:

"Now, there's Tom Bandy's testimony. Tom's a pretty specimen to be coming in here trying to swear away this plaintiff's rights. And, gentlemen, that reminds me of a story I once heard about old man Judson Tyson, who lived out here near Pond Creek," and Cole proceeded, with great elaboration of detail, to relate the story of old man Judson Tyson. It cannot grace these pages for divers reasons, not the least of which is a desire to keep within the limits prescribed by Congress in its statutory regulation of the mails of these United States of America.

The story was told, immensely enjoyed by jury, onlookers and Court, decorum to the contrary notwithstanding. While the tale is not here related, the reader ought to be told that this story was one of those lengthy affairs the whole point, wit, and substance of which hung exclusively upon the *dénouement*. The thing carried the auditor, puzzled and expectant, till suddenly, at the end, the

climax elucidated, illuminated, electrified, convulsed. Cole told it, put it aside, resumed his argument, including personalities, and it was then that Captain Henry returned to the court-room.

After unlimbering, charging, and counter-charging, Judge Cole finally ended his speech and sat down.

Captain Henry, wearing that satisfied air ever and always with him of the last speech, arose and addressed the jury. He had not spoken ten minutes before he made the fearful, fatal, pitiful mistake—penalty for absenting himself from the court-house while his worthy opponent spoke.

He told an anecdote.

*It was Cole's anecdote.*

He said that Sledge, the plaintiff, "was a rare and wonderful swearer. And, gentlemen, the way he testifies in this case reminds me of a story I once heard on old man Judson Tyson, who used to live out here on Pond Creek. It's a little long, but it's worth telling, and I am going to tell it."

And he told it.

He omitted nothing, but gave all the fearful details. It was awful. At the very outset of the tale the jury, spectators, and Court shook with laughter. The Captain, mistaking this as a tribute to his story-telling ability, inwardly congratulated himself and elaborated the greater, himself smiling at the success he was achieving. On he went. The further he went the more intense became the laughter, although no *point* had as yet appeared in the telling, a thing that did not dawn upon the

pleased narrator. He thought his comical manner of recitation was winning this plainly visible success, and he flushed with conscious gratification. The ever-increasing merriment only served to spur him on to greater effort. Once when he made a grimace in imitation of old man Judson Tyson, just as Cole had done, the laughter was side-splitting. One large and fat-faced jurymen fairly shook until the tears ran down his cheeks. The Court was inclined under the bench, his only refuge. He thought he would expire then and there. The Captain saw and noted Judge Lowden's intense laughter, something out of the ordinary with this reserved judge. This was accepted as the very highest tribute to the story-teller, and he redoubled his grimaces, antics, brogue. He prolonged the thing, loath to leave a theme that was making such a hit.

O you jury-lawyers, reading here of Henry's dilemma, may the gods of our temples never send this thing to you!

After a long agony this ended, as all things else must end. The Captain plunged vociferously into his argument. He soared, he shook his finger, he lauded and condemned alternately. He really made an ingenious and able argument. It availed nothing. His hearers could not listen. They tried — honestly tried. It was psychologically impossible. The laughter was still there. Very true, it had gone in under the surface, but it was yet there. The jury could still hear the brogue, could still see the second-handed grimaces, and still shook inwardly. Men may go from the sublime to the

ridiculous in a short space of time, but they cannot go from the ridiculous to the sublime suddenly. Before they get away from the ridiculous entirely the sublime has gone. Henry finished his speech.

The jury retired. To show that they carried into the jury room more of the ridiculous than of the sublime, as their door closed on them the large fat-faced juror promptly exploded. Such things are contagious, especially so when each has already an artery full of the virus. Others exploded, and presently the twelve men giggled and, like children in school, were powerless to stop themselves.

Downstairs the Captain sat and confidently awaited *his* verdict. Opposite sat Cole, feasting yet on the meal that was to last him many and many a year. Marcellus Jumpus wrote a brief note. He handed it to the sheriff, who in turn delivered it to the Captain. It read thus:

“HENRY — While you was out gettin’ that drink Cole told that Judson Tyson story to the jury. — JUMPUS.”

Lowden was looking at Captain Henry. Never in his life of observation did he so enjoy a countenance-study. Henry’s countenance, at first but usual, gradually underwent a change. You could see the thing slowly dawn upon him. Then you could see his full and complete realization of it all. It was a wonderful study in physiognomic expression.

Presently, footsteps were heard. The jury was

returning. Captain Henry arose, looked hopelessly about him, and without waiting to hear the verdict walked slowly from the court-house.

Later, he filed a motion for a new trial, his chief ground being the duplication of the Judson Tyson story. And Lowden considered it seriously — for a while.

The end of this episode occurred toward the close of the term. As the Captain entered the courtroom one morning just before motion hour, Clerk Tom New, unable to resist, said to him:

“Mornin’, Captain! how’s old man Judson Tyson this mornin’?”

“Will you,” hotly replied the attorney, “do me the kindness to go to hell, and take old man Judson Tyson with you?”

And the thing was not mentioned at Greenwood for a long while — in the Captain’s presence.



## CHAPTER XXIV

WEDNESDAY afternoon wore wearily away, while Judge Thompson and Bill Scott fought out and elucidated many phases of the ancient and honorable writ of forcible entry and detainer. Scott knew in an altogether incompetent manner — hearsay — that the tenant could not assail his landlord's title. This he voluntarily and inopportunistically suggested to the Court more than once. If the fates had ever decreed that Judge Lowden should overlook that principle of law, their plans went awry, as Scott impressed it lastingly.

Likewise, Judge Thompson displayed elaborate knowledge of the case in hand, and in his opening statement vouchsafed a long, complete, and non-understandable explanation of the distinction between a tenant at will and a tenant by sufferance. The statute of frauds and perjuries, with its hoary English origin, was learnedly dwelt upon.

This cause proceeded throughout the long afternoon, and no single note of interest broke upon the weary Lowden, who at intervals ventured only, "Overruled," "Sustained," "Proceed." But when court was adjourned at five o'clock the case was completed, and Lowden was up with the docket.

With Wednesday evening came a luminary, a satellite. Silas F. Dockery was his name, America was his nation, a certain county his dwelling-place, and damages his salvation (apologies to T. Titmouse, Esq.).

He was more than six feet tall, his forehead broad, and his head seemed a great dome set upon some pious temple. His eyes were small and cunning, but they sat too close one to the other. He wore a streaky red beard, which fell only from his chin, and he invariably turned this, end up, and played with it between his teeth. He carried a green bag—always. Instead of smiling, he fawned.

Now, Mr. Dockery came to Greenwood and fetched his witnesses with him, in the main. Very true, they could be procured in Mecklenberg County, the scene of the accident that gave rise to the pending lawsuit, but like the expert mechanic Dockery's personal witnesses gave to his structure of evidence those innumerable little fine touches that the witnesses to the fact either would not or could not supply. He drove up to Hanna's door in state, registered himself and his valiant deponents, shook hands patronizingly,—with both hands,—and was very soon actively getting it circulated that his case was a "big lawsuit." As a matter of actuality, the case was decidedly unimportant and trivial; but Dockery in twelve hours had the town agog and talking of nothing but "the Roads case."

When court convened the following day Dockery strode in in all the majesty of his six feet and his massive dome. When he entered, Judge Lowden had the sensation produced when a reptile crawls nigh, and Bill Scott said to the lawyer sitting near him, "There's old Uriah Heep again."

Now Dockery's case was not set for Thursday. It was not set for Friday. Saturday was the day. He came Wednesday—he and his witnesses. Wherefore this early arrival? O, ye of little knowledge, know ye not why? He came to build up a sentiment in the community—for his case. His early arrival, all these witnesses, all this preparation, clearly foretold that a "big case" was impending.

Ere many hours men were saying "Dockery doesn't fool away his time with little cases," and "Mr. Dockery turned down all offers of compromise." This latter observation had been successfully put afloat by Dockery, as we shall see anon.

Marcellus Jumpus was associated with Dockery in this case, to help select the trial jury—for a pittance, and that contingent. Before motion hour Dockery had a list of the jury panel. He knew to what political party each member thereof belonged and with what church each juror affiliated. He ascertained where they all resided, their records at this and former terms as jurors in damage suits.

"Well, Mr. Binkley," he lied to that juror, "I am glad to see you looking so well. I recall seeing you on the jury here several years ago." All of which did not displease Juror Binkley, as may be seen by those who know that flesh is weak, and that even a juror is flesh.

At that motion hour Dockery had a motion. He was sitting among the jurymen in good fellowship, when he arose. He did not say, "Roads v. L. & N. R. R. Co.," but only "the Roads case," as if

all the world knew of this great cause. Judge Beckwith, for the defendant, knew all these well-worn tactics. Instead of striking back and exposing them, he sat and quietly suffered with nausea. Dockery in "the Roads case" took some orders for the personal appearance of four or five doctors. He explained that he had tried to take the deposition of a Philadelphia specialist, but had failed. However, he said, "These fine Mecklenberg County doctors will do."

Now, two of these chanced to be present. As jurors are flesh, even so are physicians and surgeons. They were not displeased with Dockery.

Judge Beckwith called up Higgins v. L. & N. R. R. Co.—another of Dockery's cases. He wanted something definite done about it.

"Continue it, Judge Beckwith," said Dockery. "That's a *small* case, Judge. Higgins had his leg broken. I'm satisfied Judge Beckwith and I can adjust it. It's too small a matter to try out."

If Higgins had a broken leg—which by no means follows,—he was much more seriously injured than was Plaintiff Roads. Now the reader might as well know what ailed Roads. He looked the picture of health—but he wasn't. *He* had "exostosis of the sacro-iliac," which, in turn, produced permanent "neurasthenia," and this in turn had produced "incipient paralysis." The muscles of the rear neck were gradually withering.

Towards evening, after Public Sentiment had been sufficiently crystallized and all eyes and ears and hearts were centered in "the Roads case,"

Dockery was talking with Jumpus. As the criminal term has ended in this chronicle, their conversation comes too late to find place in these pages. Dockery saw two jurymen approaching. He carelessly turned his back to them. As they grew nearer and were within easy hearing, he said to Jumpus, with apparent secrecy,

"The railroad offered me five thousand in the Roads case, but I couldn't think of that in an injury like this."

The two triers of the fact heard this "secret," and forthwith gulped it down; nor did they forget it.

Beckwith would have paid one hundred dollars to get rid of the case, but no negotiations had ever been opened looking to a compromise. From all of which it must appear passing strange that no offer had been made, yet five thousand dollars in glittering gold had been spurned with scorn.

Presently Dockery and Jumpus were seen driving over the fair little city of Greenwood. Dockery went to see and to be seen.

"George Barton — he's on the jury this court," said Jumpus, "lives there, in that yellow house," and on they drove, Dockery quiet — outwardly.

It has been said that Roads was fearfully injured. The next evening Dockery, with pillows, took the injured Roads for a drive. The plaintiff stood the exertion well, until, suddenly, he weakened, grew limp, and looked as if he would faint away. It was, to be sure, the purest *accident* that this took place in the very front of Juror Barton's

house — the yellow house. Mr. Barton was on his front porch. He saw the vehicle stop. He saw Dockery alight, and realized that something was amiss. Dockery called for help, and Barton hurried to him.

"Ah, it's Mr. Barton," said Dockery. "Mr. Roads is suffering intense agony. Kindly help me lift him to the ground."

And they tenderly removed the plaintiff to the soft greensward. Dockery whispered to Barton:

"He collapsed suddenly. I had every reason to believe he could stand this little drive; it should have helped him, poor fellow!"

A crowd assembled. A certain physician was summoned, and after half an hour of commotion Roads was gently hauled away amid such as these, "Poor fellow!" "He's in bad shape!" "A perfect wreck!"

And Juror Barton returned to his porch — thinking of poor Roads.

Meanwhile Judge Beckwith was trying lawsuits by day and preparing himself therefor by night.

By Saturday morning the docket was congested and there was little prospect of "the Roads case" being reached. Dockery entered the court-room, bowing and smiling, rubbing his clammy hands together in a way that evoked another observation from Bill Scott about Mr. Heep. Tom New looked unusually well pleased with himself this morning. The world at large knew not the reason why, but Judge Lowden did. That observant jurist had overheard Dockery asking New for some blank

subpoenas. Obtaining them, Dockery had pinned this upon the lapel of the clerk's shining black coat:

"New, I wish we had you over in our county. You know, the greatest help to lawyers is a capable clerk."

Now, if indeed the pen is mightier than the sword, fiction in this one instance was more potent than the truth, for indubitably Dockery had won New, and not through the instrumentality of truth. The thoughtful Dockery had seen to it that both the clerk and the sheriff were fully advised on one point. Roads, his plaintiff, was insolvent. If he lost, away went the plaintiff's costs, particularly the clerk's and sheriff's fees. If he won, the defendant paid Roads — and their costs.

Dollars and cents do not often corrupt courts nor pollute the fountains of justice, but in Dockery's public sentiment factory two more willing hands were enlisted. Henceforth, two officials who breathed the very atmosphere of the temple — the element Dockery was trying to surcharge — were wondrous kind, and emitted these and similar predictions, "I expect Mr. Dockery will get a big verdict."

When adjournment time came Saturday "the Roads case" had not yet been called. Lowden "clogged" Judge Cole's "wheels of justice" early that afternoon, and dismissed the jury until Monday at noon. He went to his home county for the Sunday. Haggard had gone. Judge Yust, Judge Beckwith, and all the visiting attorneys took their departure, with one exception — Lawyer Dockery

remained. He had no witnesses to consult. That task had been performed thrice over. Napoleon's Imperial Guard may have been drilled, but Dockery's valiant legion surpassed them in service. Dockery had no law to investigate, for he was amply versed in his special branch. He had no rules of the defendant company to study, for he carried in his omnipresent green bag several dog-eared books belonging to that corporation, which he knew from cover to cover.

He remained over Sunday in Greenwood for none of these things. His public sentiment factory did not require his presence. The wheels of that plant were all now rapidly in motion and the product was being turned out in large quantities. The five thousand dollars he had "scorned" did not need his further attention, nor was it necessary to again take Roads driving to faint — at a juryman's gate. Lawyer Dockery remained over Sunday to put in motion one more of his favorite schemes — the pious scheme.

Dockery was what is called "a prominent figure" in his church. To it he had quite frequently contributed — other people's money. A fellow-townsmen had told at Greenwood that if the committees would publish that Dockery had donated five hundred dollars Dockery *would* quite cheerfully donate fifty dollars. For, be it known, this astute practitioner distorted the Scriptural admonition, and gave ten per cent. of what he was heralded as giving. From all of which it is now fully established that certain artificial persons, created



and organized by and under the laws of the Commonwealth of Kentucky, from year to year opened their bursting coffers to home and foreign missions and other worthy causes all unconsciously.

So then the Hon. Dockery, on this serene and lovely Sunday morning in June, first wended his way to Sunday school. It was a Methodist church, which boasted of a large and influential congregation. His pious presence was soon noted. He contributed his mite — or somebody's — when the offering was made. By his own method, he succeeded in getting himself invited to "make a little talk" to the children. He did so. His voice was soft and kind. Jim Hanna's little daughter, next day, said to her father:

"Oh, papa, Mr. Dockery is so nice! I don't like Mr. Beckwith like I do Mr. Dockery. He made us the nicest talk at Sunday school."

Old Jim said nothing, but thought — in brimstone.

The Methodist Sunday school being over, our pious friend drifted — by pure accident — to the Baptist church. He saw to it, in some way, that his presence and his prominence were both made known.

He led in prayer.

Old Mrs. Barton, the good old saintly mother of Jurymen Barton, was heard to say, going home: "Isn't Mr. Dockery a good, Christian man?"

Sunday afternoon Dockery went for a walk. He bowed to women, smiled at men, laughed with children — as much as he could laugh.

Sunday evening, supper over, he wandered aimlessly about and by another mere accident stumbled into the Presbyterian church. He knew well one of the elders. He was at once ushered up to the front.

The good parson was absent on this occasion. A lay member talked briefly to the congregation, and concluded by saying that Judge Dockery, one of the foremost lawyers of the State, was present. Judge Dockery, he said, was not a Presbyterian, but was, nevertheless, a strong church member, a great power for righteousness in his community. He called on the delighted Dockery for some remarks.

That worthy acquiesced in the request. He spoke on what he denominated "Civic righteousness." He said that in his profession he was often thrown with hard men, who did not have the blessed peace that Christianity offered to all. And in this vein he preached, even as he had done since Thursday morning, the cause of — Roads v. the Railroad.

And when he lay upon his bed that night, knowing that "the Roads case" would be called for trial the following day, he felicitated himself in the congratulatory reflections that thus far he had left no stone unturned. And then he slept — perhaps.

## CHAPTER XXV

SILAS DOCKERY, having laid sufficient unction to his soul on Sunday, was on deck early Monday morning. Judge Lowden, defendant's counsel Beckwith, and others of the *dramatis personae* likewise responded present when the roll of the grind was called.

Shortly "Roads v. Railroad" came from the bench, and the green bag was ushered to the foot-lights. Dockery, who had talked and talked with his witnesses, saying to them, *inter alia*, that there were "different ways of telling the truth," knew that all of them were present. However, assuming the contrary, he said:

"Your Honor, I will call my witnesses. I think they are here, but have not had an opportunity of seeing them all."

And he called over a very long list, including many men of prominence. Dockery did not intend to introduce half of these witnesses, but it helped things immeasurably to indicate to the jury that so many people of standing were "lined up" for the plaintiff. And so it happened, even as of old, that many were called but few were chosen.

Finally the worthy Dockery announced ready. Beckwith did likewise, and very shortly "the Roads case" was under trial.

Responding to the Court's inquiry as to whether counsel desired the exclusion of the witnesses,

Dockery—who had thrice the number had by Beckwith, and whose interest, therefore, would be best subserved by allowing them to hear the trial—with his pre-eminent fairness said:

“I am willing for these gentlemen to remain inside. It is more comfortable than standing around on the outside.”

Judge Beckwith, notwithstanding he knew how well Dockery’s cohorts had been drilled, preferred to have them testify without the hearing of each other. So the multitude, quite sullenly, vacated the room. A juryman reflected how fair was Dockery and how strict and rigid was Beckwith.

“That’s what I call an audience by duress,” remarked Bill Scott to Tom Henderson.

“What’s that, Bill?” asked Henderson.

“Old Dockery must have an audience. They won’t come voluntarily, so he has them summoned as witnesses and forces them to stay.”

The jury being chosen, Roads was brought in.

The accomplishments being now pulled off were those that Marcellus Jumpus tried to initiate in the case of Hazel v. Blackwood Coal Co., of which we got a glimpse in the earlier pages of this chronicle. It will be recalled that Jumpus did the thing right well, but compared to the present actor he was the basest imitator. Jumpus *tried* to sympathize with an injured plaintiff and *tried* to assist him about, whereas Dockery, the past-master, *did* those things.

The opening statement was meager. There had been some ice on the car steps, and that was about all his auditors grasped. The allegation was a

general charge of negligence,—avoiding specification,—a practice recognized and permitted in Kentucky. It did not confine the plaintiff to any single act of negligence designated in advance of hearing the testimony, but afforded him the opportunity, not only of pressing any particular act of negligence known by himself, but of pouncing, vulture-like, on any additional failure of duty suddenly appearing in the trial.

The statements being concluded, the testimony began. Printer's ink and wood pulp are too dear to warrant a detailed account of the different versions of the many witnesses. To those desiring all the evidence, reference is here made to the transcript of testimony, of record in the clerk's office, as made, transcribed, and certified by S. J. Browning, Esq., official stenographic reporter of the Mecklenberg Circuit Court. The x-ray photographs of the plaintiff's bones are likewise among the archives.

To Henderson, Doss, and others among the observers these things looked like mere clouds or blots upon a glass negative. To Dockery they plainly showed the "exostosis of the sacro-iliac," which, on being interpreted, means (perhaps) a bony growth or formation on some bone in, about, or near the base of the spine.

Dockery, ever fair and honest, offered no objection to any question put by Beckwith. He knew Beckwith would ask few, if any, incompetent ones. He himself asked the most ridiculously incompetent questions. When Beckwith objected, this is what

he invariably met, before the Court could rule, "I withdraw it, Judge. I don't want anything that is not fair and right."

And so, all day long, these things were withdrawn—from the record, not from the jury's minds. At each objection by Beckwith the impression that he was attempting to conceal some fact by legal technicality gained ground, and at each generous withdrawal by Dockery his eminent fairness impressed itself upon the twelve men trying the case.

Toward the end of Dockery's evidence he produced a letter purporting to be from an absent witness whose name had been called several times throughout the trial.

"Judge Beckwith, I have a letter here from Mr. Turley, who saw all this thing. I tried to get him here, but he has a sick boy and was afraid to leave him. I told him you would accommodate him by letting his letter be used as his deposition. Turley is a fine, honest fellow—can't you agree to read his letter to the jury?"

Of course Beckwith declined, with thanks.

"All right," said the ever-smiling Dockery. "It is not sworn to, and you can prevent its reading—if you insist. I thought the jury would like to hear Turley's evidence."

About this time the "neurasthenia" got in its work, and Roads was presenting a model illustration of masculine hysteria superinduced by a collapse of the nervous system. Dockery asked that court suspend for an hour, to allow Roads time to

collect himself. Lowden, already goaded, declined to entertain this suggestion, and presently the plaintiff recovered himself.

Later in the day Dockery suggested that perhaps the jury were weary and would like a recess of thirty minutes, to get a breath of fresh air. Considerate Dockery!

He finally closed. The motion for a non-suit, or for a "premp," in local parlance, came. It came strong and fast. Beckwith was armed and equipped for this encounter. He pressed his foe on all sides. For every proposition he cited respectable authority, and plenty.

Dockery, at first defiant, grew apprehensive. A cold wave traversed his spine. He replied. His reply was disjointed, illogical, scattering. He did not himself see his own *scintilla*. A less penetrating jurist would have sustained Beckwith. He had Dockery beat, but not the Court.

Lowden's ruling was that the train porter had sworn it was his duty to clean the car steps of the ice; that he had noted the ice on the steps, and had cleaned it; that no more had accumulated after he did so. Roads swore that after all this had transpired he had fallen on the ice. There was, therefore, *some evidence* that the ice was there, and that it caused the fall. Quite true, a dozen witnesses called by Dockery on other points stated there was no ice on the steps. But where there is any evidence, no matter how slight, it is the province of the jury to pass on it. Therefore, the Court must submit this case to the jury, although the Court

might be of the opinion he would set aside any verdict they returned in favor of the plaintiff — the *scintilla* doctrine, a thing as incongruous as it is permanently imbedded in the jurisprudence of Kentucky.

When Beckwith's first witness, the conductor, took the stand the clerk was out when directed to swear the witness. Dockery knew the conductor would state nothing material, as he had very little knowledge of the case.

"Don't wait on the clerk," said Dockery. "I will waive the swearing of Captain Dodd. He is truthful whether sworn or not."

And so, throughout all of Beckwith's testimony, Dockery "played to the galleries," as Scott expressed it. The evidence was concluded when the hour for adjournment came. The motion for a non-suit, being renewed, was overruled. The jury were admonished with unusual force, the Court knowing quite well some methods of a certain attorney engaged in the trial.

Next morning the case was argued. Beckwith, the first, was strong, forceful, clean. Dockery followed. He had not once interrupted his opponent. He who has the last speech needs not to do so. When Beckwith objected to some prejudicial foreign matter in Dockery's speech, the latter would say:

"I withdraw it all. I never objected to anything you said, Beckwith. These fellows who defend these corporations somehow always want to hide something from the jury. But don't you con-



sider what I said, gentlemen, if Mr. Beckwith objects. I want to be fair."

And on he went. An extract will not be out of place.

"Gentlemen," he said, "last summer I broke down. My health was impaired — standing in court-houses, day after day, month after month, year after year, fighting for helpless, crippled people in combat with giants of wealth finally broke down my health. I was weak. I was sick. My doctor said to me, 'Dockery, you had better go off somewhere and rest.' I could hardly get away. Fatherless children and noble little women, widows, had battles to fight. Their condition appealed to me. In my prayers I asked God for strength to help me fight these great and powerful corporations, to whom this twenty thousand dollars we are asking for is as a penny to you and me.

"Finally, I went away to rest. I went up on the Hudson River. I sat on the deck of one of those magnificent boats as we glided up that beautiful river. I saw palaces, kingly mansions, worth millions, on the shore. One palatial castle struck me in particular. I inquired. A man told me whose it was. He was one of the directors, gentlemen, in this great railway. I thought of him and of poor, crippled, ruined Roads — Very well, Mr. Beckwith, if you object, I will withdraw it all. Don't consider it, gentlemen. I don't want my friend Beckwith to leave the court-house thinking I have been unfair to him. Beckwith's a splendid lawyer — a fine fellow. No bigger heart any-

where than his. I know from little things he has said to me how he pities poor Roads. And I know, if Beckwith had his way, he would pay Roads, and this case would not be here. But the fellows higher up, in the counting-room, control that, and Beckwith is here fighting a battle against this crippled man in which he takes no heart.

"Oh, gentlemen, how they fear and despise a jury! In legislatures and congresses they can lobby and pull wires and manipulate, and before courts they can split hairs and raise technicalities; but get 'em before a jury of plain, honest men, how they tremble! Why, my friend here would have made most any sacrifice to have induced his Honor on the bench to throw this case out of court. They fear you twelve men, who can't be bluffed, nor bought, nor misled. And well they might fear the people. Do you know how many thousands of human lives and limbs are yearly sacrificed to their carelessness, how many orphans and widows are —— Now, Mr. Beckwith, I did not interrupt your argument. But consider it all withdrawn, if you object. Tom Roads had rather hobble home, dragging his wrecked body to a bleak and desolate fireside, penniless, than to get a dollar of this company's money by anything unfair."

And thus he proceeded for nearly two hours. His speech was stenographically reported. Many objections were noted and exceptions reserved; and an equal number of withdrawals and admonitions by the Court, telling the jury not to consider the matter objected to.

The objections and exceptions worked more detriment than benefit. The jury treated them thus, "It's a pity Mr. Beckwith can't be as fair with the jury as Mr. Dockery." The Court of Appeals thus disposed of them:

"Counsel strongly insist on the misconduct of the plaintiff's attorney in addressing the jury, in that certain irrelevant and incompetent statements were injected into the argument, and these statements all fully appear in the bill of exceptions. We have examined these extracts from the attorney's argument. They were altogether irrelevant and improper. But in each instance, on objection, they were withdrawn and the jury admonished not to consider them. We cannot indulge the presumption that the jury did not heed these admonitions. On the contrary, the inference is just the opposite."

Leaping over intervening details, a long story is made short by quoting the jury's verdict, concurred in by ten members thereof:

"We the jury find for the plaintiff, and fix the damages at \$9,878.00."

And the "home office" of Beckwith's corporation knew of the trial and verdict that day, and wondered how such a thing was possible. They did not know, however, of the five thousand dollars "spurned" offer of compromise; the Methodist and Baptist and Presbyterian churches; the illness at Juror Barton's gate; and other things not in proof, but known by the twelve who sat in "the Roads case."

! And they were an honest twelve, every man among them. Of official and personal integrity they had an abundance. Their weakness lay only in this—being poorly schooled in the fine and subtle art of studying human nature; from which it followed that sham and pretense, wrapped in the cloak of virtue, escaped their detection. Not so with an experienced judge, used to the study of men. If forty Dockerys, wearing forty cloaks, should masquerade in his presence for thirty minutes sham and pretense would be visible, and lo! forty scoundrels.

And, *en passant*, let it be said here, you “friend of the great common people,” do not go hence and denounce this observation of a well-known truth as an argument against the ancient and priceless system of trial by jury. One may point out defects in a structure, not as an argument in favor of destroying it, but with the hope that the same may be cured and the structure thereby made more durable and enduring. So, if any of Dockery’s kidney misquote this absent chronicler,—as Dockerys usually do,—kindly file an answer traversing his averments, pleading the truth, not for Dockery’s benefit, but for those like the twelve in “the Roads case,” who, not penetrating, might be humbugged by the cloak he wears.

## CHAPTER XXVI

COLE was insisting, learnedly, the next day that in the case of *Rice v. I. C. R. R. Co.* the burden of proof was on the plaintiff. He had unlimited faith in a last address before the jury. Lowden was convinced that Cole's contention was correct, while Colonel Stevens, for the company, had not even suggested otherwise. There were two companion cases against that public service corporation, *Rice v. I. C. R. R. Co.* and *Haggin v. I. C. R. R. Co.* Judge Cole was attorney for each, and had with great assurance prepared both actions. They were actions at law to recover seventy-five dollars for the death of Rice's cow and a similar sum for the death of Haggin's cow. The cause of action sued on was that a telegraph operator, in the service of the defendant, had carelessly and negligently thrown a quantity of bluestone from a blockhouse; that it fell on the green and inviting bluegrass; that the grass was eaten by the cows, by which they were poisoned, and from the effects of which poison they had both "swelled up, drank a pond dry, and then died." The two causes were identical, even to the extent of the value of the two cows.

Rice's case was first on the docket, Haggin's next. Both Rice and Haggin were present. Rice was to testify for Haggin and Haggin was to testify for Rice, from which it will be seen that reciprocity is not confined alone to political economy.

When Rice's case was called Judge Cole announced ready, Lowden's ruling, giving him the conclusion on Stevens, had in Cole's opinion disposed of the case. The trial began. Bill Scott left the court-house. He said he would return about the time "Old Cole charges the ramparts," which belligerent remark related to the plaintiffs' attorney's speech.

The proof was clear that the bluestone had been thrown out of the blockhouse. It was established that it was deadly poison. The cows were seen grazing there; they then were seen rushing to a near-by pond, where they, knee deep, drank until their bellies came near bursting. Then they died.

It was shown that bluestone affected animals just this way. The twofold inquiry of negligence or no negligence and whether the cows were actually killed by the chemical was submitted to the jury. Stevens argued his defense as best he could. He and those in attendance took it for granted the jury would decide both questions against the defendant. He threw in some suggestions about cows being allowed to stray on other people's property; the probability of them eating bluegrass and the improbability of their eating a bitter, uninviting poison.

Judge Cole followed — and pursued him. He at once got his elevation, and retained it. Rice looked at his lawyer in unconcealed admiration. Old man Haggin, a stern, severe man, softened as Cole "laid it on." He reflected to himself, "He'll blister 'em in my case the same way."

When Cole concluded, Stevens congratulated him.

"Great argument, Cole," said he. "I suppose they will not take long to make me pay you that seventy-five dollars."

"Plain case, Colonel, plain case," replied the gratified advocate.

And the jury passed out.

The Court called attention to the presence of a person of unsound mind who was to be tried, saying he would defer the calling of Haggin's case for a few minutes, until the lunacy case could be disposed of, and took that matter up at once.

Old Haggin saw only that his case was not called. He motioned to Cole and asked,

"When will my case be tried?"

He was a man abounding in suspicion, and firmly believed that every lawyer was apt to "go over to the other side" at any minute. Cole assured him that his case would soon be called, and then strolled over near the bench, where Stevens and Lowden were chatting, pending the well-worn formalities of a lunacy inquest.

"Cole," said Lowden, "you made a capital argument in that case, capital argument."

"I just told him the jury would promptly agree with his theories and his figures," joined in Stevens.

"What's the use in going through a trial of Haggin's case?" said the Court. "The two cases are similar in every way."

"Pay me, Stevens," said Cole. "You know I've got you where the wool is short."

"Yes, but I like to see you earn your money," responded Stevens.

"Why don't you agree," interposed the docket-clearer, "to let the verdict in the Rice case be taken as the verdict in the Haggin case?"

"In other words," objected Stevens, "why don't I simply hand over the money to Cole without trial?"

"Come on, Colonel," insisted Cole, pressing the point, "be game. I never knew you had feathers on your legs before."

"What's the use," insisted Lowden, "in trying both the cases, when all the facts in one are the facts in the other?"

"The Colonel in a game of draw poker would lay down fours, if the other fellow pushed in his stack," taunted Cole.

"Well, I'm giving you the money, but I can't oppose the plaintiff's lawyer and the Court too," said Stevens. "I'll agree to it."

"Draw the order," joyfully assented Rice's and *Haggin's* attorney.

Thereupon, this order was quickly prepared:

"Mecklenberg Circuit Court.

"Haggin	} Order.
v.	
I. C. R. R. Co.	

"By consent of the parties to this action, made in open court, it is agreed that the verdict and judgment in the case of Rice v. I. C. R. R. Co., now under consideration by the jury, shall be taken and entered as the verdict and judgment in this cause."



Both lawyers "OK'd" the order, the Court scrawled "Enter L" on it, and immediately it was delivered to the clerk. And the trio continued to chat, in undertone, while the County Attorney was examining some witnesses touching the inquiry whether the person of unsound mind was an idiot or a lunatic.

Old man Haggin sat upright and stiff, waiting the calling of his case.

"Drat the delay of these courts!" he reflected. "I want to get my money and get away from here."

He beckoned one of his witnesses and was impressing certain points upon his understanding. Cole, Stevens, and Lowden still chatted. Mr. Haggin thought his lawyer could do something to hurry the trial.

Anon, footsteps of twenty-four feet were heard. The jury in the Rice case was returning with a verdict. Stevens prepared himself to hear the words he had long since become accustomed to; Judge Cole, having that last speech still in mind, stood modestly by to receive his laurels.

The verdict read thus:

"We, the jury, find for the defendant.—CASPER HICKS, Foreman."

"So say you all, gentlemen?" came from the Bench. Affirmative nods, and then: "You may be excused from the further consideration of this case."

Cole sat down.

Lowden watched him. He stared, dazed, at the blank wall. Presently the Court noted him turn his head slightly and look at old Haggin. Then it seemed to Lowden a shiver passed over Cole's dejected frame.

"Wright v. Jowling Tie Co.," called Lowden, still further studying Cole's countenance.

Old man Haggin beckoned to Judge Cole, who pretended not to observe it. He beckoned again, but by this time Cole's back was to him. No looking around for him; nor would Lot's wife, so circumstanced. Judge Cole wanted time to think. He *had* to have it.

Presently old Haggin got up and crossed over to Cole. "Cole," he whispered, "when are you goin' to try my case?"

"Eh — well — eh — Mr. Haggin," attempted trouble's victim, "it can't be tried now — not just now."

"Why not?" pressed the relentless.

"Little pleadin' to do, you know; delays matters — some," faltered Cole.

"What pleadin'?" his client insisted.

"Technicality — pure technicality. Hard to explain," replied Cole.

"When will it be called?" asked Haggin. "I want my case tried. Rice's losin' don't bother me." Then whispering, "Five of them jury is my best friends. You try my case. I'll attend to the rest of it."

"Better continue it until I can see further," suggested the now limp, last-speech advocate.

"Don't want it continued; never consent to it in the world," said Haggin. "It was Rice's time to continue, not mine, when I've got all them friends on the jury. Call it up when they get done with this sparrin' in Wright's case."

"Might be disastrous; you can't tell," ventured the desperate Cole. "Better put it off."

"What's Colonel Stevens going away for?" demanded old Haggin, as Stevens gathered up his books and file, got his hat and left the court-room. "Don't he know my case is next?"

"Yes — no. He had to take his books away. You know, books get lost left around here. He knows all about the situation — all about it. But you see it's a technical question."

"Damn all that!" said the old man, now visibly angering. "I want that cow case tried — *now*."

If hope springs eternal in the human breast, there are times in the tide of men's affairs when it dies — after awhile.

Cole was on a great sinking ship. The waves had gone over the deck and he had climbed to the tower. They had crept up about him there and he had scaled to the very top of the mast. The ship then had beached, and only his head emerged from the gurgling waters.

It was then he confessed. He informed the old man that he had agreed with Stevens to permit the verdict in the Rice case to be the verdict in Haggin's case.

"What?" screamed Haggin.

The old man looked at Cole. He motioned him

out of the court-house. As they went away Lowden thought Cole was withering away.

Ah, if Rice had won! Cole would have been the wisest and best of lawyers. Haggin, successful plaintiff, would have rejoiced and given praise unto his name. All of which calls to mind a trite and altogether true saying to the effect that nothing in this wide, wide world succeeds like success.

About noon that day a certain old man, who had had a fine Jersey heifer killed by the railroad, wandered into Captain Henry's law office and said to that worthy:

"I want to hire you to get a new hearin' in my cow case."

## CHAPTER XXVII

"I BELIEVE Lowden will hold that our man has an equitable lien on that property," said Brownlow, as he and Henderson sat in their office that afternoon, talking of a certain chancery case.

"Well," replied Henderson, "you have read that tenth Bush case, and it strikes me it's on all-fours with our case. Does she say in her deposition that he promised to have the deed made to her?"

"Not as satisfactorily as I should have preferred," rejoined Brownlow; "but when I got to that point I lived days while she was testifying."

And the lawyers continued this discussion until interrupted by the unannounced entrance of a young man, perhaps six and twenty, who "had a case."

Thomas Barton, defendant in a divorce proceeding, desired the advice of counsel.

"Ellen has sued me for a divorce," he began, "and I ain't objectin' to that, particular. It's this. Her father and mother are at the bottom of her leaving me, and they tell me you can make a man pay for separatin' man and wife. I ain't no lawyer, but if there's any way to get at 'em I'd like powerful to do it."

"You want to sue the girl's father and mother for alienating your wife's affections, is that it?" asked Brownlow.

"I guess that's what you call it," responded the prospective client.

"Sit down," suggested Henderson, "and let us have all the facts. First, is the old gentleman worth enough property out of which you could collect your judgment, if you got one?"

"He's got three good farms," informed Barton, "and plenty of stuff besides."

"Well," said Brownlow, "let's have all the facts—all of them. Those against you more fully than those for you."

"Well," began the applicant for legal advice, "it's a short story. Ellen and me, we got married three years ago. I bought a place and was trying to pay for it. We had to work hard, and I think this didn't suit the old folks at all. They got down on me, and I am satisfied they persuaded her to do what she done. She first used to go home and stay several days at a time. I could see she was gettin' dissatisfied. Then she went oftener. One day she went away. She cried that day when she left—and kissed me good-by. That's the last I know of her until they served them papers on me—the divorce business. Of course if she wants a divorce and don't want to live with me it's all right; but the old man and the old woman persuaded her to do all this. She never would have done it if they'd let her alone. Her mother owns half of the property, and they tell me I've got to sue 'em both."

"Did anybody, as far as you know," inquired Brownlow, "ever hear either the father or the

mother speak to your wife unkindly concerning you?"

"Not that I know of," answered Barton.

"Did they ever say anything to her in your presence reflecting on you?" asked the senior member.

"No."

"Do you know any person by whom you can prove any fact showing they induced your wife to leave you?"

"No, I do not," answered Barton.

"Have you any notes or letters written by either the father or mother, on the subject?" examined Henderson.

"None at all."

"How do you expect us to bring such a suit with no evidence at all?" asked Brownlow.

"Don't know. They told me Tom Henderson was the man to see."

"Can we sue them both, Brownlow?" asked Henderson. "I mean can we sue the father and mother *jointly* for alienation? I doubt it."

"No doubt about that," rejoined Brownlow. "They are joint tort-feasors. Their joint and combined acts produced this separation. You may sue either or both, and the jury may find against either or both. Been clearly decided. But, thus far, we haven't enough evidence to get to the jury. We can't get a verdict on your suspicion, Barton. You must connect the old folks in some way with the separation."

"I know they put her up to it," said the hus-

band; "but, come to think of it, there ain't no proof."

"Do you want her to come back to you?" asked Henderson.

"Yes; but she will never do it," answered Barton.

"Are you sure she will not come back, if you insist?" asked Henderson.

"Oh, I know she won't," he replied.

"Did you ever mistreat her, or abuse her, or neglect her?" asked Brownlow.

"Never did. Never had a cross word."

"Did you ever go home drinking or ——"

"Never touched liquor in my life," interrupted Barton.

"How, then, do you account for her leaving you?" insisted Henderson.

"She just got tired of me. Before the old folks interfered she was satisfied. They dissatisfied her. I know it."

"There's the rub," said Brownlow. "A most excellent case, plenty of property to compensate you — if you had any proof that they had anything to do with it. What do you say, Tom?"

"Good case," replied Henderson, "only lacking in one thing, which is everything — evidence. You are not going to resist the divorce case, are you?"

"Well, I haven't got any lawyer in that case, hoping they would let her alone and maybe she'd come back."

"Well," said Henderson, "that's all we can do



now. Drop in here in an hour from now and we will see what can be done."

Barton took his departure, and Brownlow resumed his investigation of the chancery case, in which the partners were engrossed when the disturbed young husband entered.

"Nothing to that case, Tom," said Brownlow. "No evidence at all. Better tell Barton so right now."

"Perhaps you are right," said Henderson, as he walked to and fro the length of the office.

And so they worked, Brownlow on the case in chancery, Henderson on Barton's case, walking to and fro.

In less than an hour Barton returned.

"Barton," said Henderson, "can you give me the names of ten or twelve first-class men out in your neighborhood who know you and your wife, and who would like to see the divorce case dropped and you two reconciled?"

"Easy," said Barton, who proceeded to name a dozen neighbors, all of whom were known to be substantial, trustworthy citizens.

"Now," resumed Henderson, "you sit there at that desk and write these letters exactly as I dictate them."

Barton, thus guided, wrote these two letters:

"DEAR ELLEN:

"I am very unhappy in my present state. I implore you to come back to me. I never in any way

wronged you. Will you not drop all these divorce proceedings and come home? Answer.

“ Faithfully,  
“ TOM B.”

“ DEAR MR. AND MRS. GATES:

“ I am hoping Ellen will drop the divorce case and come back to me. Won't you use your influence to that end? I have never in any way mistreated your daughter.

“ Truly,  
“ THOS. BARTON.”

“ What's the use of all this?” said Barton, as he signed the letters.

“ Do as your doctor says,” replied Henderson. “ Address and mail both of these letters. Have you ever mentioned to any person your determination to sue Mr. and Mrs. Gates about this matter?”

“ Only to Henry Hughes. He's the fellow who sent me to you.”

“ You see Hughes *now*, and caution him about absolute secrecy. Don't intimate to any other person that you have the slightest idea of bringing such an action.”

Barton, in mystery, agreed.

“ Now,” continued Henderson, “ you go direct to these twelve men, whose names you have given to me, and to each one say this, and this only: ‘ My wife has left me. She has sued for divorce. I want the trouble dropped, the divorce case aban-

doned, and ourselves happily reconciled. Won't you, as a mutual friend, go over to Mr. Gates' and try to induce her to come back to me? Also talk with her father and mother, asking them to use their influence for a reconciliation.' When you have told them this, urge them to do it at once. When the twelve friends have interviewed your wife, Mr. and Mrs. Gates, go to each man, get his report of their answer, and then come to Greenwood and let us have it. Do exactly as we tell you, and do it quickly."

"But how about my case?" asked the wondering Barton.

"When you return, we will talk that over. Hurry and do as we suggest."

Leaping over, temporarily, the last few days of the June term, to which we shall return directly, Barton reported in several days. He was as mystified as ever. He had mailed the two letters, as directed. He had received no replies. The twelve neighbors had been seen, as directed. They had called on the Gates family; had failed signally in their mission, and reported divers experiences.

The twelve men made twelve separate reports. Added together the twelve statements contained these facts:

Called and found Mr. and Mrs. Gates and Ellen. Brought up subject of reconciliation. Ellen said that was what she wanted. Mr. Gates refused to listen to such a suggestion. Mrs. Gates said it had taken Mr. Gates and herself two years to show Ellen what a no-account specimen Barton

was. Mr. Gates said the silly little fool would never have left Barton if he and her mother had not simply taken the bull by the horns. They knew what was best for their daughter. They had finally induced her to leave him, and they would never consent to her going back to him. They had a letter from Barton the other day, and Ellen had one the same day, but, fearing the girl would weaken and do something she would regret, they destroyed her letter and told her of it afterward. They saw two years ago that he was not the man for Ellen, and they made up their minds then to get her away from him. She cried and went on, but she's always been an obedient daughter, and finally saw we were right. The lawyer says we may have to wait a year before she can get the divorce, but we will just wait. Grateful for neighbors trying to patch the thing up, but it can't be patched up. The girl would make up with him in a minute, but she married young, and doesn't know her own mind.

And so the twelve reported, each adding a detail or two, but in the main their reports were identical.

When Barton concluded his report he said:

"Now, about the other matter, what about that?"

"What other matter?" asked Henderson.

"My suit against the old folks," said he.

"You have won it," said Henderson.

"Won it! Then have you found any witnesses?" inquired obtusely.

"Just twelve,—these twelve,—and most excellent ones, too. They know all the details,—all,—and learned them from the mouths of the defendants themselves. O Brother Gates and Sister Gates, you have talked too much," and the adroit though legitimate evidence finder laughed merrily.

The dazed Barton saw it all, and wondered why so simple a thing had not occurred to himself.

Brownlow, who worshiped at the shrine of Henderson, glowed with pride.

"Worthy of Quirk, Gammon, and Snap," he said.

"I object," replied Henderson. "Nothing was manufactured or created. There will be no false swearing, or even exaggeration. Only the truth will be used. Sometimes it is difficult to dig up the truth. A fact exists, but you can't prove it. Here were myriad facts, strong, potent, controlling facts, lying dormant, concealed, buried. We merely throw off the lid and, behold! a treasure. Don't associate that with making evidence. We made none. It was already made. We only found a means of showing to a jury that which already existed. It is never questionable to present the simple truth."

When the summons was served on old man Gates and his busy wife, and they had become acquainted with the nature of the suit, the wife, once an industrious matchmaker, now the contrary, said, with considerable bravado:

"I'd like to see him prove any of that stuff, I would."

"So would I," added her co-defendant.

Then his countenance lengthened. Something dawned upon him that instant. He saw the twelve neighbors file by, one by one, in his mind's eye. Ah, they were being sworn to testify as witnesses against him.

"Damn that young Henderson!" he growled.

Eventually the case of Barton v. Gates was tried. It originated at the June term, and with its origin alone can these pages deal. Chronicles of other sittings of the Mecklenberg assizes must tell of the ultimate conclusion of this case — discovered, not created, by Barton's lawyer.

## CHAPTER XXVIII

THURSDAY, the sixteenth day of the term, dawned clear and beautiful. Motions, growing less numerous, indicated that the June term was on the wane. Tobias Mathews was trying his Russell case. Those attorneys who had causes following the Russell case did not vacate the court-room, notwithstanding the fact the defendant had quite an array of witnesses in that case and the plaintiff had not yet closed. They had heard Russell himself testify, and thought they saw the handwriting on the wall. In short, it was freely thought that whenever Mathews announced through for the plaintiff, then, in a few brief moments, the next case on the docket would be called.

And here is how their prophecies were verified. Mathews had sued the Diamond Coal Co. for and on behalf of one J. Russell for damages for personal injury. In some way, to this deponent altogether unknown, Mathews had run the gamut of demurrers, and had stated a valid cause of action. Russell alleged that he had been a driver in the mine operated by the defendant; that while in the line of his duty he was driving a mule along the track, pulling a car of coal; that he was on a descending grade; that the mule was trotting when suddenly the mule stumbled in a large hole in the track and fell, throwing the plaintiff violently to

the ribs of the mine, seriously injuring him, etc., etc.; that the plaintiff did not know of the aforesaid hole, was a new and inexperienced servant, etc.

Russell got through swimmingly on the direct examination. He elaborated his injuries, touching lightly the facts of the manner of the accident. Mathews had rather proudly turned his client over for cross-examination. Knox, for the defendant, with a sinister and subtle smile, began gently. And here is why some other cases on that day's docket were called earlier than they might have been.

"You say there was a deep hole between the rails of the track?" asked Knox.

"Yes, there was," answered Russell, with his eyes fixed on Mathews.

"And that hole caused the mule to fall and thus injured you?"

"That's what I said."

"Now, Mr. Russell, isn't it true there was no hole there at all?"

"No, it ain't true. Biggest kind of a hole there."

"You are quite sure?"

"Of course I'm sure. I saw it there every day for two months. Used to eat my dinner there every day."

"Isn't it true you never saw it there until the day of the accident?"

"Saw it every day, I tell you. Eat dinner there by it forty times."



"And did you really know it was there every day for months before the accident?"

"I sure did; you couldn't help but see it."

"Now," pursued the relentless Knox, "you know you never saw it before, and you know it was not there before. If so, why didn't your mule fall in it before this day?"

"I say it was there. I always slowed down when I got to it. You can't make me say that hole wasn't there, for I know it was there."

Now, discriminating reader, if the truth must be told, know that Russell had not seen the said hole at all; never ate dinner near it, never avoided it, and never knew of it until the day of this accident. This was, as you have divined, the very cause of action sued on, the actual existence of the hole, *unknown to the plaintiff*. Knox, however, so framed his questions that Russell conceived the idea he would "ruin his case" unless he took the opposite view of the defendant's counsel. Had Knox asked:

"You say you knew nothing of the hole until you were injured?" his response would have been that he had not known of it. But the adroit cross-examiner saw fit to apparently antagonize the witness by saying:

"Isn't it true there was no hole there at all, and you never had seen such a thing?"

The witness, indulging the thought that it would never do to make any admissions to opposing counsel, to save himself promptly lied, thereby ruining himself. Strange anomaly! With truth from his

own lips victory was his; whereas, he lost by his own lie. Litigants — unhappily — not infrequently win by false testimony; but the cause is rare where they, having won, in an instant lose by false testimony.

Mathews closed. Then, through a haze, he was looking at Judge Lowden and was hearing some vague expressions about “assumed risk,” “contributory negligence,” “knowledge of danger,” etc., and the next thing Mathews knew he was out under the trees, explaining to Russell the meaning of a non-suit,— impossible task,— and occasionally alluding to “damn fools who sometimes cut their own throats.”

A motion for a new trial came in due course. It contained one of the most remarkable affidavits ever executed. It was the *dernier ressort* or,— as put by Bill Scott,— the “last dying kick.”

The plaintiff made solemn affidavit that actually he never knew of the existence of the hole in the track until he was injured; that he so swore on direct examination, but that Mr. Knox so framed his questions as to make affiant believe he would have no case unless he testified that he knew of the hole all the time; that Knox made him swear inaccurately and incorrectly, “for the wicked purpose of trapping affiant.” And Mathews, as counsel for the plaintiff, attached a statement to the affidavit, in which he most gravely concurred.

Now, if there be one cross-examination that meets with success, there are ninety-and-nine which produce disaster. Once upon a time an old veteran

of that bar looked about him and, observing the wreck and ruin and slaughter on all sides following a cross-examination, animadverted on the follies of that subtle and dangerous art. He declared he had the best approved definition of cross-examination. It was this: Cross-examination — A thing to be avoided.

Our old friend Captain Henry always and persistently cross-examined. As Lowden often observed, he asked questions merely because, under the law, he had the right to do so. It was not that he had any particular object in view, or was centered on any especial fact in the case; it was purely because the rules of practice permitted cross-examination. No witness should testify against him and escape his flashing eye. The fact that the witness cut the ground from under the Captain's feet at each answer made no outward or visible impression on him. The lawsuit was forgotten. All things were merged or submerged in the cross-examination.

In the case under trial, the exact date of a given event was all-important. Judge Thompson, for the plaintiff, was making every effort to show the occurrence took place on July 12, 18—. Captain Henry took issue on this allegation, and was bending all his art and resourcefulness to demonstrate the event did not transpire on that day. Old man Dotson was testifying for the plaintiff. Answering Judge Thompson, he said the thing happened on July 12. The Judge had not conferred fully with the witness, and was amply satisfied with this

unsupported answer. He accordingly turned the witness over for cross-examination.

By Captain Henry.

"You say this thing happened on July 12. And you recall it after all these years?"

"That's what I said," replied the old man.

Henry, not satisfied to drop the matter then and there, contenting himself with later arguing to the jury the improbability of so accurate a memory, proceeded further out on the cracking ice.

"How can you remember a thing so long, with nothing special to attract your attention to it at the time, I'd just like to know?"

"Well," said the old man, "my wife died the day this thing happened, and I guess a man ain't very apt to forget that."

Henry, having fixed by a contemporaneous event the exact date his adversary was attempting to establish, continued to exercise his legal right of cross-examination.

"And you think, no matter how many years have passed, a man can't be mistaken about the date of his wife's death?"

"I know I ain't mistaken," answered the old man.

There were two men on the jury who had buried their wives more than twenty years before. They recalled the hour and minute of their deaths, to say nothing of the day and date.

Judge Thompson began to impeach the defendant. He had a half dozen respectable witnesses who knew certain "shady" things of the defend-

ant's doing. Of course, he could not prove any specific events or acts or conduct on the part of the defendant, Barrow. Under the rules of evidence, he was confined to showing the defendant's general reputation for truth and veracity. The fact that he had swindled a neighbor, plundered a friend, or what not, could not be established by proof at the instance of the plaintiff. Henry combated and defeated all efforts by Thompson to show any of these specific instances, and then proceeded, by his cross-examination, to lug them all, bare and visible, before the jury.

"Do you know," asked Thompson, "George Barrow's general reputation for truth and veracity in the community where he resides?"

"I do," the witness answered.

"Is it good or bad?"

"Bad."

"Take the witness, Captain," Judge Thompson would say, and the Captain invariably took him — *cum onere*.

"What do you know about Mr. Barrow's reputation?" he began.

"I know it's bad."

"What did you ever hear against him; just tell something," he persisted.

"Well," drawled the witness, "he burnt Mr. Hedges' barn. Everybody knows that."

"Did you see him burn it?" snapped the cross-examiner.

"No — not me; but he done it — so everybody says."

Another witness was called. He knew defend-

ant's general reputation for truth and veracity. It was bad. His opinion was made up from common talk, rumor, what men said of the defendant.

"Who did you ever hear discuss Mr. Barrow's character or reputation?" inquired Henry.

"Lots of people," he answered.

"Name some; just one, if you can," insisted Henry.

"Old Mrs. Prior told me she had known Barrow all his life, and that he had always handled the truth powerful keerless. Mr. Burns said Barrow would swear a dozen lies for a dollar bill. I have heard myself he signed a lie-bill onct. I could tell you more, but I'm not interested in this case. It ain't my business."

And so the entire half dozen buried their harpoons deep into the unseeing Henry.

Bill Scott said Judge Thompson had given Henry plenty of rope and "he had hung himself"; Tobias Mathews said "old Thompson ought to divide his fee with Henry."

Judge Cole observed that the plaintiff ought never to have employed any lawyer at all. "He simply ought to have called his witnesses, and let the Captain cross-examine himself through a slaughter-house into an open grave."

Marcellus Jumpus ventured that "you may get me on one of them peremptories, but I ain't out cuttin' my throat from year to year."

Some of these comments reached the ear of the Captain. They were as water on the duck's back. The very next case he tried he cross-examined the enemy's witnesses, as he said "from hell to break-

fast." He continued to do so, and, if he is yet among the living, the assertion may be confidently vouchsafed he is doing so even to this day.

The jury completed their task that day, Thursday, at noon, and were finally discharged, with the thanks of the Court. They were told that the trustee of the jury fund did not have the necessary money with which to pay them, but would have it shortly. And Tom New furnished certificates of their time, which mostly were discounted to the village claim shaver. They had one in Greenwood, as in every other nook and corner of this old world, and have had since—and before—the days of the money-changers in the temple.

Friday afternoon was spent in hearing equity cases in open court. Records were read, arguments heard, some causes decided from the bench, others submitted, with "judgment see it," to be taken home by Judge Lowden for consideration.

Saturday came, the eighteenth and last day of the term. Those prisoners then in custody who had been indicted at this term were brought into court. They were asked if they desired trials at this term, and all responded in the negative, excepting one hapless youth charged with house-breaking. He requested an immediate trial. He had no counsel. The Court appointed Mathews to defend him, and a jury of bystanders heard his plea of guilty. Mathews pleaded for a light penalty. He referred to the defendant's youth and surroundings, concluding by saying:

"Gentlemen, this poor boy is in a bad fix."

Old Judge Thompson, sitting near by, looking at the boy's attorney, said absent-mindedly, though quite audibly:

"That's a fact."

The court was very nearly broken up. Lowden could not preserve countenance with which to command order. While everybody laughed, Mathews grinned, not the least daunted.

The Court charged the jury. Under the defendant's plea of guilty they had no province save to fix the penalty. They retired and took with them the Court's instructions — and Judge Thompson's animadversion.

So potent are small things in directing larger things, the jury never agreed. There was a mistrial on this plea of guilty. Some of the jury said afterward that Judge Thompson's remark made it impossible for them to convict that boy, who was in such "a bad fix." Mathews, as is the wont and habit of the human race, saw not the wherefore of his client's escape, but felicitated himself on his skill in effecting so successful a result. He said to Henderson:

"It strikes me you are going some when you hang a jury where there is a plea of guilty, eh, Tom?"

To which Henderson replied, naively:

"Yes, Tobe, right you are. The boy was in 'a bad fix.'"

After which Tom New's sneeze was wafted up through the swaying trees outside.



## CHAPTER XXIX

THAT afternoon, as the sun's rays slanted through the western windows of the old court-house and the tall oaks above murmured one to another, the dockets were closed with a great bang, and Judge Lowden ordered that court be adjourned "until court in course." The June term of the Mecklenberg Circuit Court was history.

Old Uncle Toby carried forth the sawdust boxes, swept the building, threw the water from the cooler, closed the windows and doors, and spent long summer days "fishin'" against the coming of the next milestone in his career — the October term.

The echoes of voices died away. Appeals, eloquence, wit, humor, satire, sarcasm, logic, wisdom, from Henderson, Thompson, Stevens, Haggard, Beckwith, Yust, Brownlow, Cole, Knox, Mathews, Henry, Scott, and others were "gone from earth forever," and the mute, silent old edifice stood beneath the protecting branches of its parent oaks in dignity and repose.

Ah, old court-houses of the Commonwealth! what a world of memories, what a wealth of history, what myriad of thrilling events, thy very old portals conjure up! Man and progress and wealth have swept them all — nearly all — away. Their ancient walls have been razed and new and splendid temples reared upon their ruins, temples com-

mensurate with the march of men toward perfection and commensurate with the power and splendor of a great Commonwealth. It was the inevitable. Yet, to those who love the annals of Kentucky, to those who revere her history, at least a tinge of regret is unavoidable when the four-walled court-houses where Clay thundered and Breckinridge sung are dismantled!

Two hours after Judge Lowden had reached his hotel he was formally notified that, as a token of esteem and friendship, he was to be the guest of the Mecklenberg County Bar that evening at a banquet arranged exclusively in his honor.

"The boys," said Judge Cole, "concluded you had been coming over here for years; and, excepting that cane, they had never done anything showing their appreciation. So be here at Jim Hanna's dining-room at nine o'clock. We promise not to run into Sunday."

At supper that evening Captain Henry was one of Hanna's guests. The Captain, freshly shaven, spick and span, took several meals at Hanna's hotel during each term of court. Such a thing never entered his head during vacation.

On this occasion he, Lowden, and the other diners had about concluded their meal when the worthy Captain did a thing that to this day, in Greenwood, is recalled to the chagrin and discomfiture of James Hanna, as far as such things are possible with that impervious individual. A large ham, pronounced by Henry as "strong as Holy Writ," rested undisturbed and undisturbing at the

head of the table. The Captain had noticed this ham at the head of the table in the early days of the term. Again in the middle of the term he had supped with Hanna, seeing again the same ham, and now on this closing day of the June session here was this same venerable and patient ham. As the distinguished guest started to leave the dining-room, and was in the act of passing the head of the table, he seized a large meat fork and, burying it deep into the insensible hog, lifted it in the air, and looking squarely at it, delivered himself thus:

“Hold up your right hand, please. Do you acknowledge yourself indebted to the Commonwealth of Kentucky in the sum of one hundred dollars, to be void, however, on your appearance here on the first day of the next October term of the Mecklenberg Circuit Court and not departing without leave of court?”

Having suffered the ham to go “on his own recognizance,” the attorney passed out into the hotel lobby.

At nine o'clock that night the Bar of Mecklenberg County—every man Jack of them—filed into Hanna's banquet hall. Wars, controversies, bickerings, quarrels, fights, contests, in short, lawsuits, were forgotten. And here was a company of genial, jovial, friendly comrades come to revel in the society of each other—come from the scene of battle to the banquet board of peace and friendship.

Ah, you physicians and surgeons who carve on each other more than on your hapless patients,—

and *never* leave off,—go and take some sort of physic that will cure you of an old, infectious, contagious disease known as Envy, to the end that where two or three of you are gathered together there may be good fellowship in lieu of daggers. Strange anomaly! The relation of lawyers professionally one to another is all combative; yet they love one another, and have since time began. Doctors, never in combat professionally, consistently and heartily despise one another; that is, those within the range of competition.

The hosts assembled. Jim Hanna had thrown the small tables together, creating one long banquet board, which terminated at right angles with a shorter section of tables, thus making a cross. At the short section sat the guest of honor, Henderson the toastmaster, and those who were to respond after dinner.

The toasts were to be a *résumé* of the term just expired. The menu was wholesome, abundant, and provincial. Of wine there was none, although a certain friendly jug reposed in No. 18, where Uncle Toby handed to those who dropped in water, sugar, *et cetera*, particularly *et cetera*. Not at this juncture accepting Hanna's challenge for an argument on the proposition, this narrative would not be complete without quoting his expressed views on that subject, to-wit, the jug.

"How the devil can there be a feast of reason and flow of souls on ice water?"

Thus he presented the argument, heard the same and rendered his decision—and provided the jug.

Touching the soundness of his philosophy we shall have naught to do, as these unpretentious pages are but the purveyors of facts, not expounders of proper rules of conduct. Nor shall there be specification of those who entered No. 18 and those who did not. Some one of our guests, in the far-off future, in an unguarded moment, *may* aspire to public office, and in these halcyon days of *your* dictating *my* system of morals and code of ethics the published information would militate against our friends' aspirations. There be quite a large and highly respected element of our citizenship who would have none of your candidate — if he visited Room No. 18. Therefore, those who are riding the wave shall have no chance to sit astride the crest of any breaker passing over the prostrate form of any of this goodly company.

So, friends of the Mecklenberg Bar, if any of you have a desire to respond to the beckoning Hanna on this festive night, have no fears of the *holier-than-thou* dictators. They shall not bring this record against you. Of course, if Captain Henry and Judge Cole should chance to stand for the same office at the same time, each would know the other's record; each knowing, others would not know. In other words *in pari delicto*, etc.

But this is *obiter dicta*.

The guests reveled. Hanna related, privately, an anecdote at his end of the table, and the roar of laughter shook the very rafters overhead. At the other end Bill Scott made an observation that produced a rival storm, while near the center Jumpus

vouchsafed that he was unable to reach a verdict concerning the quality of a certain decoction in Room No. 18 without more evidence. The merriment was fast and furious. Everything was competent, relevant, material, and in the record of that proceeding there was noted no objection or exception. As Cole expressly remarked, everybody had "cart blank."

When in the discretion of the toastmaster — and this is a sound discretion — the time was ripe for the speeches, he arose from his seat. Now, there is an art in knowing *when*. Many great lawyers know when to cease speaking; many great captains know when to charge the enemy; many great singers know when to cease singing; but few, very few toastmasters know when to rise. On this occasion Henderson suddenly divined the psychological moment. When he arose he was greeted with a storm of applause — and this before he had uttered a word. Now, he had done nothing to provoke applause. It was merely the psychological moment. He stood smiling, waiting the end of the greeting. Silence, anticipatory silence, pervaded the room. Bill Scott, down low in his chair — poor Bill, he'll never run for office anyhow — said thickly, but audibly:

"See the skonquering hero come."

Henderson was driven to cover. Quiet being finally restored, he again arose and was again greeted with liberal applause. He made a speech. He explained the object of "the evening festivities" and paid a glowing tribute to Judge Lowden.

At the height of one of his most flowing flights Brownlow's deep voice crushed things when he said "Slush!"

However, Henderson got through somehow. He read the list of orators for the occasion, with their respective subjects. This feature of the banquet was unique. No man was to know his subject until assigned to him by the toastmaster when called upon. Unique, but altogether appropriate, for the memory of man runneth not to the time when post-prandial orators ever spoke on the subjects assigned to them. As these speeches were to review and perpetuate the history of the June term, the selection of topics was confined to such subjects as would effectuate that result. It was this that Tom Henderson read:

SUBJECTS	SPEAKERS
The Russell case . . .	Mr. Jumpus
Old Man Judson	} . Captain Henry
Tyson who lived on Pond Creek	
Two cows . . . . .	Judge Cole
Bluestone . . . . .	Colonel Stevens
In a Bad Fix . . . . .	T. Mathews
Some Fluids I Have Known .	J. Hanna
Our Bar Association .	Judge Thompson
\$9,878.00 (Dockery) .	Judge Beckwith
Knowing How . . . . .	Tom New
An Ear to the Ground . .	Jas. Higgins
The Jury (Not Present) .	Geo. Brownlow
Some Cross-examinations .	Wm. Scott

To err is human,  
to set aside the } . Judge Lowden  
verdict, divine

The fact that there were to be thirteen speeches made nobody's flesh creep. Scott removed any feeling of anxiety on the part of the superstitious when he said there would be only twelve toasts and one oration; or, as he put it, "Jim Higgins will deliver an orashun, the smiling valleys of Mecklenberg County, the blue vault of heaven, the underrified Demogrocy of this distrig," and his head inclined to the table, uttering no more of the Hon. Higgins' figures of speech.

And it was thus this June term of the Mecklenberg Circuit Court came to be numbered among the things of the past. The speeches were all made. The official stenographer was not present and it would be an injustice to those participating to attempt to quote from memory. The reader, being familiar with the speakers and their subjects, may form his own conception of them.

When the last cigars were lighted and the June night was far spent, the goodly company bade farewell one to the other — for some, a long, long farewell; for others, until the October term, which would follow in the golden autumn, when the frost had kissed the hillsides into a thousand colors and green meadows would be brown and sere, and roses and violets withered and lifeless — gone to sleep until some other June.

THE END

Bx/A6  
12/3/27











